Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
KIRK S. CORSELLO,

Petitioner,

v.

LINCARE, INC., LINCARE HOLDINGS, INC.,
LINCARE HEALTHCARE GROUP, INC.,
AMERICAN HOMEPATIENT, INC., ROTECH, INC.,
ROTECH MEDICAL CORPORATION, and
ALAN VARRAUX, M.D.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals' restrictive interpretation of Fed. R. Civ. P. 9(b) imposes an excessive burden on *qui tam* relators that is contrary to this Court's precedents, is inconsistent with the language and purposes of the rule, and undermines Congress's stated intent to encourage whistleblowers with knowledge of wrongdoing to come forward.

2. Whether failure to comply with Fed. R. Civ. P. 9(b)'s requirement that, "[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity," is in all cases fatal to a complaint filed under the False Claims Act, when the False Claims Act expressly provides that intent to defraud need not be proven and imposes liability in circumstances that do not constitute fraud.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Kirk S. Corsello respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals is reported at *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005). App. at 1.[1] The Order denying rehearing is unreported. App. at 49.

JURISDICTION

This Court has jurisdiction to consider this case by way of a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). The Opinion of the Eleventh Circuit Court of Appeals was issued on October 20, 2005. The petition for rehearing was denied on January 6, 2006.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 9(b) provides in pertinent part: "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Pertinent provisions of the False Claims Act, 31 U.S.C. § 3729-3730, are set forth in the attached Appendix. App. at 51-61.

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[1] "App." refers to the attached Appendix to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Kirk S. Corsello ("Relator") filed his original *qui tam* complaint under seal on January 22, 1998, alleging that various defendants were liable under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, for presenting false claims for payment to the United States. On January 13, 2000, after the government declined to intervene, Relator filed a Second Amended Complaint ("SAC") against defendants Lincare, Inc. and Lincare Holdings, Inc. (collectively, "Lincare"), Rotech Medical Corporation ("Rotech"), American HomePatient, Inc. ("AHP"), and Dr. Alan Varraux. Lincare, Rotech, and AHP were nationwide providers of durable medical equipment and home health services. Relator was previously employed by Lincare as a center manager in Orlando, Florida, and by Rotech as a regional salesman.

In the SAC, Relator alleged that the defendants submitted false claims for payment to Medicare and Medicaid in a variety of ways. Most importantly, Relator alleged that the defendants routinely submitted claims that were false because they were based on required Certificates of Medical Necessity ("CMNs") that had been forged, altered, or otherwise improperly completed. SAC, ¶¶ 52-104. The SAC provided dozens of examples of individual claims submitted as a result of this practice, providing the initials of the patient, the date of the CMN, and in many cases the name of the employee falsifying the document. SAC, ¶¶ 59, 76, 81, 92. Relator also alleged, among other things, that a large number of claims were false because they were based on patient referrals that were induced by unlawful kickbacks to the referring physician. SAC, ¶¶ 23-48.

On March 9, 2001, the district court entered an order dismissing the SAC with prejudice for failure to comply with the particularity requirements of Fed. R. Civ. P. 9(b) ("Rule 9(b)"). App. at 30. Relator filed a notice of appeal on April 6, 2001. On December 20, 2001, however, the Eleventh Circuit Court of Appeals dismissed the appeal as being premature, holding that the claims against defendant

Rotech, which was in bankruptcy, were not adjudicated by the district court's order and thus remained pending.

Upon remand, on September 2, 2002, Rotech, having emerged from bankruptcy, filed its own motion to dismiss the SAC. On October 18, 2002, Relator filed his response to Rotech's motion, and also filed a proposed Third Amended Complaint ("TAC"), which added no new substantive allegations, but merely undertook to provide the types of "indicia of reliability" which the Eleventh Circuit, in its recent decision in *U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002), had held for the first time were necessary to support an allegation that claims had been submitted. In particular, the TAC added allegations demonstrating Relator's familiarity with defendant's billing practices. TAC, ¶¶ 66, 184, 195-205.

On June 2, 2003, the district court granted Rotech's motion to dismiss Relator's *qui tam* claims in the SAC pursuant to Rule 9(b). The court denied Rotech's motion to dismiss the SAC's separate retaliation claim. App. at 25. The court also modified its March 9, 2001 dismissal order to reinstate Relator's retaliation claim against Lincare. App. at 27. The court denied Relator leave to file the TAC, in large part because it felt that the TAC would not cure the defects in the SAC. App. at 28.

Following dismissal of the retaliation claims, Relator filed his notice of appeal on April 1, 2005. On October 20, 2005, the Eleventh Circuit entered an opinion affirming the district court's ruling, and holding that Relator's complaints did not satisfy Rule 9(b). App. at 1.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the proper application of Fed. R. Civ. P. 9(b) is an issue of overwhelming importance with respect to the False Claims Act, the country's primary tool for combating fraud on the American taxpayers.

This Court has never directly tackled the issue of how properly to apply Rule 9(b)'s requirement that the

"circumstances constituting fraud" be "stated with particularity." In those few cases where this Court has mentioned Rule 9(b), it has done so parenthetically, in the context of addressing other issues. However, these cases have suggested that Rule 9(b) is to be applied liberally, and is not to be extended beyond its clear terms.

The lack of any clear guidance by this Court has led to divergent approaches in the lower courts regarding the application of Rule 9(b) to False Claims Act cases. In the Eleventh Circuit at least, Rule 9(b) has been transformed from a rule of particularity into a rule of substance, with plaintiffs being required not merely to state their allegations with sufficient "particularity," but also to demonstrate that they are sufficiently "reliable." This requirement is directly contrary to this Court's admonition that, on a motion to dismiss, the allegations of the complaint must be accepted as true and construed in the light most favorable to the plaintiff.

Moreover, in applying its "reliability" test to cases involving fraudulent submission of claims to Medicare or Medicaid – by far the largest category of FCA claims – the Eleventh Circuit has effectively held that only those persons working in a defendant's billing department can properly allege that claims for payment have been submitted to the government as a result of the defendant's fraudulent schemes. This ruling will have a devastating impact on the effectiveness of the False Claims Act as a tool for combating fraud, since billing employees are unlikely to be in a position to spot a defendant's fraudulent practices. In effect, the Eleventh Circuit has limited the universe of potential whistleblowers to those persons who are unlikely to have any knowledge of fraud. In order to preserve the effectiveness of the FCA as a tool for fighting fraud, the Court should grant certiorari to review the decision below.

I. The importance of the False Claims Act.

The False Claims Act is the government's primary tool for combating fraud against the federal government. *See*

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 792, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (Stevens, J., dissenting); *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *Avco Corp. v. United States Dep't of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989). The Act allows a private citizen, commonly known as a "relator," to bring an action on behalf of the relator and the United States against persons who present false or fraudulent claims to the government. If the government intervenes in the action, the relator is entitled to receive 15-25% of the proceeds. If the government declines to intervene, the relator has the exclusive right to prosecute the action himself, and is entitled to receive 25-30% of the proceeds. *Vermont Agency, supra*, 529 U.S. at 769-770; 31 U.S.C. § 3730(c), (d).

The FCA was originally enacted in 1863, with the goal of "stopping the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309, 46 L.Ed.2d 514, 96 S.Ct. 523 (1976); *see also Vermont Agency*, 529 U.S. at 781. However, the FCA was little used over the following decades, and its effectiveness was further reduced by amendments in 1943 and subsequent judicial decisions, which greatly restricted individuals' ability to bring actions under the statute. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991) and *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 823 (9th Cir. 2005) (discussing 1943 amendments and subsequent judicial interpretations).

In the face of mounting evidence that "fraud in Government programs and procurement [was] on a steady rise," *Vermont Agency*, 529 U.S. at 793 n.4 (Stevens, J., dissenting), Congress substantially overhauled the statute in 1986. As the Eleventh Circuit has noted, "fraud against government [was] so rampant and difficult to identify [that the] government needed all [the] help it could get from private citizens." *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994),

citing United States ex rel. LaValley v. First Nat'l Bank, 707 F.Supp. 1351, 1355 (D. Mass. 1988).

The primary purpose of the 1986 amendments was to induce persons with knowledge of fraud to come forward and file *qui tam* actions. S. Rep. No. 345, 99th Cong. 2d Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5271, 5288-5289 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."). As the Third Circuit noted:

> One theme recurring through the legislative history in 1985 is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud. Congress sought to stop the "conspiracy of silence" among employees of corporations engaging in fraud. *See* S. Rep. No. 345, 99th Cong. 2d Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5271.

Stinson, 944 F.2d at 1154.

The 1986 amendments allowed cases to be brought even when the government had knowledge of the relevant facts, provided relators with a guaranteed share of any recovery, expanded the relator's participation in the litigation even where the government elects to intervene, and increased the damages recoverable under the Act. *See* 31 U.S.C. §§ 3729(a)-(b), 3730(d). The amendments also expressly provided that specific intent to defraud need not be shown, clarifying that a defendant may be liable if it acts with deliberate ignorance or reckless disregard of the truth or falsity of information. 31 U.S.C. § 3729(b).

This Court has recognized the fundamental changes wrought by the 1986 amendments:

> The basic purpose of the 1986 amendments was to make the FCA a "more useful tool against fraud in modern times." S. Rep., at 2. Because Congress was concerned about pervasive fraud in "all Government programs," ibid., it allowed private parties to sue even based on information

> already in the Government's possession, *see Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997); increased the Government's measure of recovery; and enhanced the incentives for relators to bring suit.

Cook County v. United States ex rel. Chandler, 538 U.S. 119, 133, 123 S.Ct. 1239, 155 L.Ed.2d 247 (2003). As the Seventh Circuit has noted, "[e]very change made in 1986 made it more likely for FCA claims to be filed and to succeed." *United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969, 975 (7th Cir. 2002), *aff'd*, 538 U.S. 119 (2003).

Since the passage of the 1986 amendments, as the statute has become more widely-known, the FCA has become an increasingly important tool in combating fraud on the taxpayers. Since 1987, the government has recovered more than $15 billion pursuant to the FCA, of which nearly two-thirds, or $9.6 billion, has resulted from *qui tam* actions brought by private relators. Approximately $400 million of this amount represents recoveries in cases where the United States declined to intervene, and the case was prosecuted by the relator. *See* http://www.taf.org/fcastatistics2006.pdf.

Underscoring the central importance of the FCA, this Court has four times in the past nine years granted certiorari to resolve issues surrounding the statute. *See Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005) (addressing statute of limitations for FCA retaliation claims); *Cook County*, *supra* (holding that counties are subject to liability under FCA); *Vermont Agency, supra* (holding that relator has standing to bring action based on partial assignment from United States; also holding that States and State agencies are not "persons" subject to the FCA); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (addressing retroactivity of 1986 amendments). However, the Court has never granted certiorari to consider the extremely important

question of the proper application of Rule 9(b) to FCA cases.

II. This Court has never directly addressed the proper application of Rule 9(b).

Since the adoption of Rule 9(b) in 1938, this Court has never granted certiorari for the purpose of determining the proper application of the rule. Indeed, the Court has mentioned Rule 9(b) in only a handful of cases over the past 68 years, and only in the context of addressing other issues. Those decisions have made it clear, however, that the rule is to be applied liberally, and is not to be extended beyond its express terms.

Perhaps this Court's most extensive commentary on Rule 9(b) came in *Rotella v. Wood*, 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000), where the Court granted certiorari to determine when the statute of limitations begins for RICO claims. In rejecting the argument that the limitations period begins upon discovery of the pattern of racketeering activity, the Court briefly touched on Rule 9(b):

> Finally, Rotella returns to his point that RICO patterns will involve fraud in many cases, when he argues that unless a pattern discovery rule is recognized a RICO plaintiff will sometimes be barred from suit by Federal Rule of Civil Procedure 9(b), which provides that fraud must be pleaded with particularity. While we will assume that Rule 9(b) will exact some cost, we are wary of allowing speculation about that cost to control the resolution of the issue here. Rotella has presented no case in which Rule 9(b) has effectively barred a claim like his, and *he ignores the flexibility provided by Rule 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery. See, e.g., Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1050-1051 (CA7 1998) (relaxing particularity requirements of Rule 9(b) where

> RICO plaintiff lacks access to all facts necessary to detail claim).

Rotella, 528 U.S. at 560 (emphasis added).

Thus, the one aspect of Rule 9(b) that the Court chose to emphasize was its "flexibility," noting that the rule would be relaxed where the plaintiff lacked access to information. Significantly, the case the Court cited on this point, *Corley v. Rosewood Care Center, Inc. of Peoria*, relied on concerns that are directly applicable to False Claims Act cases. In *Corley*, the Seventh Circuit stated that:

> We have noted on a number of occasions that the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim, and *that is most likely to be the case where, as here, the plaintiff alleges a fraud against one or more third parties.*

Corley, 142 F.3d at 1051 (emphasis added). The exact same situation exists in False Claims Act cases, since the relator is bringing an action for fraud committed, not against himself, but against a third party – the United States government. Thus, to the extent that *Rotella* discusses Rule 9(b), it strongly suggests that, where the fraud is directed against third parties other than the plaintiff, the rule is to be relaxed to allow the plaintiff to obtain detailed information in discovery.

In two other cases, this Court refused to extend Rule 9(b) to actions other than for fraud. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), the Court held that civil rights cases alleging municipal liability need not satisfy a "heightened pleading standard" beyond that required by Rule 8(a). In so holding, the Court stated that:

> Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal

> Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*

Id., 507 U.S. at 168. Subsequently, in *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), this Court relied on *Leatherman* to hold that a complaint alleging employment discrimination "must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. Proc. 8(a)(2)." *Swierkiewicz*, 534 U.S. at 508. In so holding, the Court rejected the notion that Rule 9(b) applied to claims of employment discrimination. *Id.* at 513.

Neither *Leatherman* nor *Swierkiewicz* addresses the proper application of Rule 9(b) in cases where the rule does apply. However, both cases make it clear that Rule 9(b) is not to be stretched beyond its express terms.

In one other case, nearly 60 years ago, the Court briefly mentioned Rule 9(b), but without any discussion. *See Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 93 L.Ed. 266 (1949) (discussing district court's power to enter default judgment depriving a naturalized citizen of his citizenship). Thus, in the 68 years since Rule 9(b) was adopted, this Court has yet to issue an opinion providing significant guidance as to how the rule is to be applied.

III. The lack of guidance from this Court has led to confusion in the lower courts as to the proper application of Rule 9(b) in FCA cases.

It is not an understatement to say that Rule 9(b) is perhaps the single biggest roadblock to *qui tam* relators today. The leading treatise on the False Claims Act by a prominent FCA defense attorney contains 23 pages devoted to "The Application of Rule 9(b) to False Claims Act Complaints." John T. Boese, Civil False Claims and *Qui Tam* Actions, Vol. 2, § 5.04, p. 5-43 – 5-66 (3d ed. 2006). A

Lexis search of the terms "Rule 9(b)" and "False Claims Act" yields more than 330 cases.

Every circuit to have considered the issue has uncritically accepted that a complaint brought under the False Claims Act must in all circumstances comply with Rule 9(b)'s particularity requirement. As discussed below, these holdings are mistaken, since a relator may prove an FCA violation without proving fraud. Putting aside the threshold question of whether Rule 9(b) applies, however, the lack of guidance from this Court has led to lower courts applying a hodge-podge of approaches to Rule 9(b) in False Claims Act cases.

As the Department of Justice has noted, the single largest category of FCA cases involves claims of healthcare fraud, in particular Medicare and Medicaid fraud. *See* http://www.usdoj.gov/opa/pr/2005/November/05_civ_595.html ("As in the last several years, health care accounted for the lion's share of fraud settlements and judgments" in FY 2005). These cases allege that claims are false or fraudulent for a number of reasons. Many cases allege that individual claims for Medicare reimbursement are false because they are based on patient referrals that have been induced by improper kickbacks. *See, e.g., United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F.Supp.2d 1017 (D. Tex. 1998). Other cases allege that Medicaid claims for pharmaceuticals are false because the prescriptions have been induced by off-label marketing of a medication. *See United States ex rel. Franklin v. Parke-Davis*, 147 F.Supp.2d 39 (D. Mass. 2001). Still others, such as this case, allege that claims are false because the underlying physician order or authorization has been altered or is in some way improper. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005).

The common thread for each of these types of cases is that they involve the submission of a large number of claims – thousands or tens of thousands – over an extended period of time. In considering the proper application of Rule 9(b) to these types of cases, lower courts have put forth widely divergent approaches.

A. Some cases hold that allegations regarding the "fraudulent scheme" are sufficient to satisfy Rule 9(b).

Many courts, when faced with Rule 9(b) challenges to such complaints, have held that it is not necessary for the relator to identify specific claims for payment submitted as a result of the defendant's "fraudulent scheme," reasoning that such identification is not necessary to put the defendants on notice of their alleged misconduct, and that the individual billing records are in the possession of the defendant. In *Franklin, supra*, 147 F.Supp.2d 39, for example, the relator alleged that a drug manufacturer violated the FCA by promoting one of its drugs for "off-label" uses, or uses other than those approved by the Food and Drug Administration. The defendant argued that "the pleading of the basic scheme of fraud or the identification of certain instances of fraudulent conduct does not satisfy Rule 9(b)." *Id.* at 49. The court rejected this argument, noting that:

> [t]his view of Relator's pleading obligation may fit a scenario where the alleged fraud is confined to a small number of transactions about which Relator had knowledge. However, where the alleged scheme of fraud is complex and far-reaching, pleading every instance of fraud would be extremely ungainly, if not impossible. . . . Although the Relator here does not identify specific prescriptions for Medicaid patients for off-label uses made by doctors in reliance on the fraudulent representations, [the Relator] . . . does not reasonably have pre-discovery access to that patient-specific information.

Id.

Similarly, in *United States ex rel. Pogue v. American Healthcorp, Inc.*, 977 F.Supp. 1329, 1333 (M.D. Tenn. 1997), the court rejected a Rule 9(b) challenge to a complaint which alleged that contractual relationships between doctors and hospitals constituted a kickback scheme

that resulted in the filing of Medicare claims. The court stated that:

> [a]lthough no specific dates or West Paces employees are identified, the complaint alleges that the hospital participated in a systematic, fraudulent scheme, spanning the course of twelve years; thus, reference to a time frame and to "West Paces" generally is sufficient. . . . [R]equiring Plaintiff to refer to the specific instances underlying each Medicare and Medicaid claim submission that he claims was fraudulent in his [complaint] would undermine Rule 8's admonishment to keep pleadings simplistic.

Id. (internal quotation marks omitted). Other cases illustrative of this approach include *United States ex rel. Downy v. Corning, Inc.*, 118 F.Supp.2d 1160, 1173 (D.N.M. 2000) (noting that, in complaint alleging submission of false claims for unnecessary medical tests, "some form of limited discovery would probably be necessary to allow Relator to provide such specific examples"); and *Thompson, supra*, 20 F.Supp.2d at 1049 (S.D. Tex. 1998) (noting that "The basic framework, procedures, the nature of the fraudulent scheme, and the financial arrangements and inducements among the parties and physicians that give rise to Relator's belief that fraud has occurred have been alleged with specificity").

B. Some cases hold that identification of specific claims submitted as a result of the fraudulent schemes is required.

Another line of cases has held that it is not sufficient to provide detail regarding the defendant's fraudulent scheme, but that a relator must also provide detailed information regarding individual claims submitted as a result of such schemes. This line of cases is illustrated by *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 232 (1st Cir. 2004), where the court held that:

> Underlying schemes and other wrongful activities that result in the submission of fraudulent claims are included in the "circumstances constituting fraud or mistake" that must be pled with particularity pursuant to Rule 9(b). However, such pleadings invariably are inadequate unless they are linked to allegations, stated with particularity, of the actual false claims submitted to the government that constitute the essential element of an FCA qui tam action.

Other cases illustrative of this approach include *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) ("The conduct to which liability attaches in a False Claims Act suit consists in part of false statements or claims for payment presented to the government. . . . Because such statements or claims are among the circumstances constituting fraud in a False Claims Act suit, these must be pled with particularity under Rule 9(b)."); *United States ex rel. Walsh v. Eastman Kodak Co.*, 98 F.Supp.2d 141, 147 (D. Mass. 2000) ("Without citing a single false claim arising from an allegedly false invoice, Relator has not met even a bare-bones Rule 9(b) test."); *United States ex rel. Butler v. Magellan Health Serv., Inc.*, 101 F.Supp.2d 1365, 1369 (M.D. Fla. 2000) ("Plaintiff does plead a fraudulent scheme of conduct which may well be prohibited by law. However, Plaintiff pleads no specific occurrences of a false claim. . . . The absence of specific allegations of fraudulent false claims is determinative.").

C. Some cases disregard express allegations unless the complaint contains sufficient "indicia of reliability."

A third line of cases – which includes the present case – has held that it is not sufficient to allege the "fraudulent scheme" in detail, nor is it sufficient to identify particular claims that are alleged to have been submitted as a result of such schemes. Rather, this line of cases holds that the relator's express allegations of claim submission may be

disregarded if they are not supported by sufficient "indicia of reliability."

This "indicia of reliability" test originated with the Eleventh Circuit's decision in *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002). In that case, the relator alleged that the defendant routinely submitted false claims to the Medicare program for laboratory tests that were unnecessary, duplicative, or otherwise improper. In addition to alleging the details of the fraudulent scheme, the complaint also identified a large number of specific tests that were performed, providing the patient initials, the date of the test, and the type of test; described why the tests were improper; and expressly alleged that a claim for payment was submitted on the date of the test or within a few days thereafter. *Id.* at 1304-1306 and n.7.

Notwithstanding this level of detail, the Eleventh Circuit disregarded the relator's express allegations regarding the submission of claims. The Court held that:

> Rule 9(b)'s directive that "the circumstances constituting fraud or mistake shall be stated with particularity" does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government. As in *Cooper*, and as with every other facet of a necessary False Claims Act allegation, if Rule 9(b) is to be adhered to, *some indicia of reliability must be given in the complaint to support the allegation of an actual false claim for payment being made to the Government.*

Id. at 1311 (emphasis added).

The court noted that the *Clausen* relator was not an employee of the defendant, and assumed that, being a "corporate outsider," the relator was "not . . . privy to [the defendant's] policy manuals, files and computer systems." *Id.* at 1302-03, 1314. Thus, the Court was skeptical as to

whether the relator was telling the truth when he alleged that claims were in fact submitted for payment to the government. *See id.* at 1313 ("we cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit"); 1313 n.23 ("we cannot . . . assume LabCorp actually billed the Government in whole or in part for all tests it 'took the trouble to order' "); 1312 n.21 ("We cannot make assumptions about a False Claims Act defendant's submission of actual claims to the Government"). In short, although the complaint expressly alleged that specific claims for payment were submitted, the Court disregarded such allegations because it did not know whether the relator was telling the truth.

In a vigorous dissent, Judge Barkett expressed concern that "the majority reaches the conclusion it does because it suspects that Clausen's lawsuit is without merit," and cautioned that:

> A court should not rely on its estimation of the merits of the underlying suit when deciding whether a complaint has complied with the requirements of Rule 9(b). My concern with the law the Court makes today is that it is undiscriminating, as likely to result in the dismissal of meritorious lawsuits as it is to protect defendants from unwarranted litigation.

Id. at 1316 (Barkett, J., dissenting).

In the present case, the Eleventh Circuit was given the opportunity to clarify its holding in *Clausen*. However, far from limiting *Clausen*'s scope, the court went beyond its holding in *Clausen*, making it even more difficult for a relator to satisfy Rule 9(b). Although *Clausen* required that a complaint contain indicia of reliability to support its allegation that claims were submitted as a result of the fraudulent schemes, it did not place limits on how such reliability could be demonstrated. To the contrary, *Clausen* indicated that indicia of reliability could be provided in a number of ways, including information about "policies about billing or even second-hand information about billing practices." *Id.* at 1312 and n.21.

Unlike the outsider relator in *Clausen*, Relator Corsello was a former employee of the defendants, and alleged familiarity with the defendants' billing policies and practices. In his Second Amended Complaint, Relator Corsello alleged, among other things, that defendants submitted numerous claims for payment that were false because they were based on Certificates of Medical Necessity (CMNs) that had been altered, forged, or otherwise improperly completed. As in *Clausen*, Relator identified a large number of specific claims that were submitted as a result of such schemes, providing the patient initials, the date of the CMN, the manner in which it was altered, and in many cases the person involved in the alteration. SAC, ¶¶ 59, 76, 81, 92.

After the Eleventh Circuit issued its opinion in *Clausen*, adopting the "indicia of reliability" standard, Relator filed a proposed Third Amended Complaint, which added no new claims, but simply provided additional allegations regarding the defendants' billing practices so as to provide additional indicia of reliability for the allegations of claim submission. Among other things, the Third Amended Complaint alleged that it was defendants' practice to submit a claim for payment for every CMN, and that such claims were automatically submitted by the billing departments. TAC, ¶¶ 66, 184, 195-205. The district court refused to allow the filing of the Third Amended Complaint in large part because it did not believe the amendment would satisfy Rule 9(b). App. at 28.

In affirming the district court's holding that Relator's complaints did not satisfy Rule 9(b), the Eleventh Circuit greatly expanded its previous holding in *Clausen*, and rejected the proposition that indicia of reliability could be provided by anything other than *direct* evidence of claims submission:

> Because it is the submission of a fraudulent claim that gives rise to liability under the False Claims Act, that submission must be pleaded with particularity *and not inferred from the circumstances*. . . . Although we construe all facts in favor of the plaintiff when reviewing a motion to

> dismiss, *we decline to make inferences about the submission of fraudulent claims* because such an assumption would "strip[] all meaning from Rule 9(b)'s requirements of specificity." *Clausen, 290* F.3d at 1312 n.21.

App. at 7 (emphasis added). And in explaining why it believed the Third Amended Complaint would not satisfy Rule 9(b), the court indicated that only billing personnel, who have access to billing information for specific claims, may provide the requisite indicia of reliability:

> In addition, the proposed complaint alleged that "sales people do not . . . have access to the specific billing information that is submitted to the government," *which evidenced that the revised complaint still lacked sufficient indicia of reliability*.

App. at 10 (emphasis added).

Thus, the court held that the single fact that Relator was a sales employee, rather than a billing employee, established that he was incapable of providing the requisite indicia of reliability, notwithstanding his extensive allegations showing his familiarity with defendants' billing practices. The Eleventh Circuit thus adopted a *de facto* rule that only direct evidence of claims submission will suffice to satisfy Rule 9(b), effectively limiting the pool of whistleblowers to those persons employed in a defendant's billing department.[2]

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[2] The Eighth Circuit, in a recent case, favorably cited the Eleventh Circuit's "indicia of reliability" test, and held that the relator's allegations lacked credibility in large part because he was not a billing employee. *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 2006 U.S. App. LEXIS 5572, *13 (8th Cir. March 6, 2006) (noting that "Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department").

IV. The Eleventh Circuit's approach will have devastating consequences for the False Claims Act, since those whistleblowers best positioned to spot fraud are unlikely to have access to claim-specific billing records.

As discussed above, the primary purpose of the 1986 amendments to the FCA was to induce persons with knowledge of fraud to come forward and file *qui tam* actions. S. Rep. No. 345, 99th Cong. 2d Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5271, 5288-5289 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."). The Eleventh Circuit's approach, as set forth in *Clausen* and expanded in the present case, will seriously undermine this Congressional policy, because there will be few if any employees who will both have knowledge of a defendant's fraud and have access to billing records for particular claims.

As discussed above, the single largest category of *qui tam* cases today consists of healthcare fraud claims, and these types of cases typically involve thousands and thousands of relatively small claims submitted to Medicare or Medicaid over an extended period of time. In most large organizations, the submission of claims for payment is made by a separate billing department, often in a different location from the company's other offices. In the present case, for example, Defendant Lincare had 15 separate regional billing offices, and more than 600 sales offices. TAC, ¶ 198. In almost all cases, claims for Medicare payment are submitted electronically, rather than on paper. *See* 42 C.F.R. § 424.32(d)(2) (requiring electronic submission of most claims). Thus, the act of submitting a claim consists of a billing clerk sending an electronic transmission to the Medicare intermediary. An organization may easily submit thousands or more of such claims for payment every day. Because the claims are submitted electronically, the billing records are stored electronically, and are available only to those persons authorized to access the database – i.e., billing clerks.

In most instances of Medicare and Medicaid fraud, however, a billing clerk will have no idea whether a particular claim – most likely one of hundreds she processes each day – is false. That is because the reason why the claim is false is completely unrelated to the actual submission of the claim, and is not evident from the face of the claim. A billing clerk who receives a batch of claim forms for processing cannot look at a claim and know that the patient's referral was induced by an illegal kickback. A billing clerk will have no way of knowing that the CMN supporting a claim has been forged, altered, or otherwise improperly completed. A billing clerk cannot look at a claim for a laboratory test and know that the test was unnecessary. A billing clerk cannot look at a Medicaid claim for a drug and know that the prescription was induced by the defendant's off-label marketing of the drug. In short, a billing clerk is exceedingly unlikely to have any knowledge that the claims she is submitting are false.

The types of employees who *will* have knowledge that a defendant is committing fraud are likely to be those unconnected with the billing office. A marketing representative, for example, is perfectly positioned to know that the defendant is paying kickbacks to physicians, or is marketing a drug for off-label purposes. A sales representative or middle manager may have knowledge that the defendant is routinely altering CMNs to make a claim payable by Medicare. To use the term employed by many courts, such employees are perfectly placed to gain knowledge of the defendant's "fraudulent schemes." It is precisely these sorts of employees that Congress, in passing the 1986 amendments, wanted to incentivize to bring their information forward.

What these employees will not have, however, is access to the electronic billing records showing that individual claims for specific patients have been submitted for payment to Medicare or Medicaid. Under the Eleventh Circuit's decision in this case, which holds that claim submission may never be established by inference, but only by direct evidence, such employees will thus be unable to provide the requisite indicia of reliability

necessary to satisfy Rule 9(b). As a result, these employees will be unlikely to take the substantial risks that are involved in coming forward with evidence that their employer is committing fraud against the American taxpayers.

It is clear that the Eleventh Circuit's approach will extract a great cost, since rarely, if ever, will a potential whistleblower be so placed as to have his hands on "both ends of the elephant" – the head, where the fraudulent schemes are designed and implemented, and the tail, where the individual claims for payment are submitted. What is equally clear is that the Eleventh Circuit's restrictive interpretation will do nothing to further the purposes of Rule 9(b).

It has been noted that Rule 9(b) serves two primary purposes: it provides notice to the defendant of what it is being accused of, and it serves to protect against spurious lawsuits against innocent defendants. *Durham v. Business Management Associates*, 847 F.2d 1505, 1511 (11th Cir. 1988); *see also Clausen*, 290 F.3d at 1313 n.24. Where, as in the present case, the relator provides a detailed description of the fraudulent schemes, and provides examples of specific claims that are alleged to have been submitted pursuant to such schemes, the defendant has clearly been placed on notice of its alleged misconduct, and a requirement that the relator provide additional "indicia of reliability" in support of such allegations does nothing to increase the defendant's awareness.

As to the second purpose, it is true that the Eleventh Circuit's approach will protect defendants against spurious lawsuits, but only because it protects them from *all* lawsuits. The inability of a relator to attach claim forms to a complaint says nothing about the merits of the case, but simply reflects the fact that the defendant has chosen to separate its marketing functions from its billing functions, and to limit employees' access to billing records. As Judge Barkett noted in her dissent in *Clausen*, the Eleventh Circuit's approach "is undiscriminating, as likely to result in the dismissal of meritorious lawsuits as it is to protect

defendants from unwarranted litigation." *Clausen, supra* at 1316 (Barkett, J., dissenting).

Indeed, many of the largest False Claims Act recoveries have involved relators who were not involved in the billing process, and who would not have gained knowledge of the defendants' fraudulent activities if they were mere billers. For example, in *Franklin, supra* – a case where the government declined to intervene – the relator was a former physician employee of Parke-Davis, a division of Warner-Lambert Company. The relator alleged that the defendant paid kickbacks to physicians to prescribe the defendant's drugs, and also improperly marketed the drug Neurontin for off-label uses. *Id.*, 147 F.Supp.2d at 45-46. However, because the defendant was not a billing employee, he was unable to identify specific claims submitted in connection with the improper activities. *Id.* at 48-49. The district court rejected the defendants' contention that the relator was required to identify specific false claims submitted as a result of the fraudulent activities, and denied a motion to dismiss based on Rule 9(b). *Id.* Subsequently, the case settled for $190 million in payments to the federal government and the states. *See* http://www.taf.org/settlements/PfizerMay2004Settlement.pdf; http://www.usdoj.gov/opa/pr/2004/May/04_civ_322.htm.

Similarly, in *Thompson, supra*, the relator was a physician who alleged that Columbia/HCA improperly paid kickbacks to obtain Medicare referrals. Because he was not a billing clerk, however, the relator could not identify the specific claims that were submitted as a result of this conduct. Nevertheless, the court held that the complaint satisfied Rule 9(b), noting that:

> The basic framework, procedures, the nature of the fraudulent scheme, and the financial arrangements and inducements among the parties and physicians that give rise to Relator's belief that fraud has occurred have been alleged with specificity; Plaintiffs are entitled to discovery before being required to list every false claim, its dates, the individuals responsible, and why each patient was not eligible for Medicare.

Id., 20 F.Supp.2d at 1049. Subsequently, Thompson's allegations were settled for more than $225 million. *See* http://www.usdoj.gov/opa/pr/2003/June/03_civ_386.htm.

Under the Eleventh Circuit's interpretation of Rule 9(b), relators Franklin and Thompson would never have been able to bring their FCA actions for the simple reason that they were not billing clerks, but were "merely" persons with knowledge of the underlying fraudulent schemes. Of course, they would not have been able to bring the actions if they *were* billing clerks, since they would have had no knowledge of the improper kickbacks or the off-label promotions.

It is thus clear that the Eleventh Circuit's restrictive approach will not further the goals of Rule 9(b), but will greatly undermine the effectiveness of the False Claims Act as a tool for combating fraud. Additionally, such an approach is directly contrary to this Court's precedents. By adding a requirement that a complaint, in addition to being sufficiently particular, must also be sufficiently "reliable," the Eleventh Circuit has directly contradicted this Court's directive that, in considering a motion to dismiss, "we must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz*, *supra*, 534 U.S. at 508 n.1; *see also Leatherman*, *supra*, 507 U.S. at 164.

Moreover, the Eleventh Circuit's restrictive approach flies in the face of this Court's decision in *Rotella*, which emphasized the "flexibility" of Rule 9(b). Indeed, *Rotella* expressly recognized that Rule 9(b) may be relaxed where relevant information is in the possession of the defendant. It is abundantly clear that, in cases alleging healthcare fraud, the billing information for individual claims, which are submitted and stored electronically, is in the possession of the defendants. Moreover, as discussed above, *Rotella* relied upon authority holding that such relaxation is particularly appropriate where the complaint alleges fraud against third parties. By definition, cases brought under the False Claims Act are alleging fraud, not against the relator, but against a third party, the United States

government. Since the relators are not the victims of the fraud, it is to be expected that they will not have access to claim-specific information in the defendants' possession, although they will have information regarding the circumstances of defendants' fraudulent activities.

In short, the Eleventh Circuit's approach to Rule 9(b) is contrary to this Court's precedents, does nothing to further the purposes of the Rule, and would dramatically curtail the effectiveness of the False Claims Act as a tool for combating fraud. The grant of certiorari is thus necessary to resolve the critically important issue of the proper application of Rule 9(b) in FCA cases.

V. Certiorari is necessary to resolve the threshold issue of whether compliance with Rule 9(b) is always necessary to state a claim under the False Claims Act.

As discussed above, certiorari is necessary to address the proper application of Rule 9(b) to FCA cases. Relator also believes, however, that this Court should address the threshold issue of whether compliance with Rule 9(b) is always necessary to state a claim under the FCA.

Every circuit court that has considered the issue has uncritically accepted that Rule 9(b) applies simply because a case is brought under the False Claims Act. *See Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 562-63 (6th Cir. 2003); *Clausen, supra*, 290 F.3d at 1308-09; *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551-52 (D.C. Cir. 2002); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995); *Karvelas, supra*, 360 F.3d at 227-228.

However, none of these decisions has satisfactorily analyzed the issue. Indeed, courts have rarely offered any analysis beyond the broad assertion that the FCA is an "anti-fraud" statute. *See, e.g., Gold*, 68 F.3d at 1476 ("It is self-evident that the FCA is an anti-fraud statute");

Bly-Magee, 236 F.3d at 1018 ("The FCA is an anti-fraud statute"). As discussed below, it is true that the FCA is an anti-fraud statute, but it is not *solely* an anti-fraud statute, and a relator may prove an FCA violation without proving fraud. Under well-established authority, if fraud is not a required element of a cause of action, the failure of an averment to satisfy Rule 9(b) does not mean that a plaintiff has failed to state a claim. Accordingly, certiorari is warranted to clarify the proper relationship between Rule 9(b) and the FCA.

A. The FCA does not require proof of fraud.

Rule 9(b) states that "[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity." Thus, by virtue of its very language, the rule applies only to "averments of fraud," and as to those "averments," only the "circumstances constituting fraud" need be stated with particularity. Rule 9(b) thus does not require that all facts creating a cause of action be stated with particularity – it only requires particularity with respect to those circumstances that constitute fraud. *See* 2 Moore's Federal Practice, 3d ed., § 9 App. 01 (1998) ("Rule 9 does not require certain averments of facts constituting a cause of action. . . . Rather, the provisions simply require more specificity for certain averments, including . . . the circumstances constituting fraud.").

If Rule 9(b) automatically applies to all cases brought under the False Claims Act, therefore, it can only be because such cases require an "averment of fraud." The False Claims Act, however, does *not* require a plaintiff to prove fraud. Rather, the act imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Thus, it is not required that the claim be fraudulent, but simply that it be false. *See United States v. TDC Management Corp., Inc.*, 24 F.3d 292, 297 (D.C. Cir. 1994) (concluding that "Congress distinguished 'false' from 'fraudulent' claims and presum[ing] the distinction to turn

on whether the defendant acted with an intent to deceive"). And with respect to the "knowing" requirement, the 1986 amendments to the FCA specifically provided that "no proof of specific intent to defraud is required," and that a person acts knowingly if he acts in "deliberate ignorance" or in "reckless disregard" of the truth or falsity of information. 31 U.S.C. § 3729(b).

It is clear that, in imposing liability where a defendant acts with "reckless disregard" or with "deliberate ignorance" of the truth or falsity of information, the False Claims Act imposes liability for actions that would not constitute "fraud," as that term is generally understood. As one of the sponsors of the 1986 amendments stated:

> Subsection 3 of Section 3729(c) uses the term "reckless disregard of the truth or falsity of the information" which is no different than and has the same meaning as a gross negligence standard that has been applied in other cases. While the Act was not intended to apply to mere negligence, it is intended to apply in situations that could be considered gross negligence where the submitted claims to the Government are prepared in such a sloppy or unsupervised fashion that resulted in overcharges to the Government. The Act is also intended not to permit artful defense counsel to require some form of intent as an essential ingredient of proof. This section is intended to reach the "ostrich-with-his-head-in-the-sand" problem where government contractors hide behind the fact they were not personally aware that such overcharges may have occurred.

132 Cong. Rec. H9382-03 (daily ed. Oct. 7, 1986) (statement of Rep. Berman), *quoted in United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997).

In *Krizek*, the D.C. Circuit noted that the phrase "reckless disregard" is sometimes used "as a proxy for forbidden intent," while at other times it is "'simply a linear extension of gross negligence, a palpable failure to meet the appropriate standard of care.'" *Id.* at 941, *quoting Saba v. Compagnie Nationale Air France*, 78 F.3d 664,

668 (D.C. Cir. 1996). The court concluded that, as used in the False Claims Act, "reckless disregard" is best understood as "an extension of gross negligence." *Krizek*, *supra* at 942; *see also United States ex rel. Augustine v. Century Health Services, Inc.*, 136 F.Supp.2d 876, 887-88 (M.D. Tenn. 2000) ("[R]eckless disregard has been construed as 'an extreme version of ordinary negligence' rather than as a 'lesser form of intent.'"). It is thus clear that the knowledge requirement set forth in the False Claims Act is closer to a negligence standard than to a scienter standard. *See United States v. Mackby*, 261 F.3d 821, 828 (9th Cir. 2001) (medical clinic's owner "acted in reckless disregard or in deliberate ignorance" by "failing to inform himself of [Medicare] requirements" before submitting claims for payment); *UMC Electronics Co. v. U.S.*, 43 Fed.Cl. 776, 794 (Fed. Cl. 1999) (contractor submitting claim "has a duty to examine its records to determine what amounts the government already has paid or whether payments are actually owed to subcontractors or vendors," and failure to do so "constitutes deliberate ignorance or reckless disregard"); *Wilkins ex rel. U.S. v. State of Ohio*, 885 F.Supp. 1055, 1060 (S.D. Ohio 1995) ("the [FCA's] scienter requirement is something less than the elements of fraud at common law").

Since the type of knowledge required to prove an FCA claim is not a lesser form of "intent" or "scienter," but is rather a heightened version of negligence, an allegation of such knowledge is not an "averment of fraud." Rather, an FCA claim alleging reckless disregard or deliberate ignorance is more in the nature of a claim for negligent misrepresentation. And it has been widely held that the pleading requirements of Rule 9(b) do not apply to claims of negligent misrepresentation. *See Am. Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 115 Fed. Appx. 662, 669 n.30 (5th Cir. 2004); *Sparling v. Daou (In re Daou Sys.)*, 411 F.3d 1006, 1028 (9th Cir. 2005).

It is thus clear that, although an averment of fraud will *suffice* to establish liability under the False Claims Act, it is not *necessary* to establish such liability. In other words, it is possible for a relator to prove an FCA claim

without proving that the defendant committed acts constituting "fraud." As this Court held in *Swierkiewicz,* 534 U.S. at 511-512, "[i]t . . . seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits." Accordingly, a plaintiff need not make an averment of fraud in order to state a claim under the FCA.

B. Where fraud is not an essential element of a claim, failure to satisfy Rule 9(b) is not necessarily fatal.

This is not to state that Rule 9(b) has no application whatsoever to the False Claims Act. Quite plainly, many FCA cases will be based on actions that constitute fraud. If an FCA complaint does make an averment of fraud, Rule 9(b) would require that averment to be stated with particularity. However, that does not change the fact that a plaintiff may state a valid FCA case without making such an averment.

The False Claims Act is not the only statute which allows, but does not require, proof of fraud in order to establish liability. Section 11 of the 1933 Securities Act creates a cause of action for the purchaser of a security if the registration statement contained a material omission or misrepresentation. 15 U.S.C. § 77k(a). In considering this statute, circuit courts have held that the proper approach is not to simply require all complaints brought under the statute to comply with Rule 9(b). As the Eighth Circuit noted:

> The only consequence of a holding that Rule 9(b) is violated with respect to a § 11 claim would be that any allegations of fraud would be stripped from the claim. The allegations of innocent or negligent misrepresentation, which are at the heart of a § 11 claim, would survive. The plaintiffs' case should not have been dismissed because they alleged more than was necessary to recover under § 11 of the Securities Act.

Carlon v. Thaman (In re NationsMart Corp. Sec. Litig.), 130 F.3d 309, 315 (8th Cir. 1997). Similarly, the Fifth Circuit has held that:

> Where averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated. The proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated.

Lone Star Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 368 (5th Cir. 2001).

In *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003), the Ninth Circuit considered the application of Rule 9(b) to a state cause of action for which fraud was not an essential element. The Court held that:

> in a case where fraud is not an essential element of a claim, only allegations ("averments") of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a). . . . Thus, if particular averments of fraud are insufficiently pled under Rule 9(b), a district court should "disregard" those averments, or "strip" them from the claim. The court should then examine the allegations that remain to determine whether they state a claim.

Id., 1104-1105.

Rather than applying this sophisticated approach to False Claims Act cases, the circuit courts have simply held that, in any action brought under the FCA, the complaint must comply with Rule 9(b). These courts have thus completely failed to recognize that it is possible to state a claim under the FCA without making an averment of fraud – in effect, the courts have judiciously stricken from the statute those provisions imposing liability on defendants for acts that do not constitute fraud. Such an approach is directly contrary to this Court's precedents in

Leatherman and *Swierkiewicz*, which have recognized that Rule 9(b) is not to be applied beyond its strict limits. As this Court has stated, "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz,* 534 U.S. at 515, *quoting Leatherman*, 507 U.S. at 168.

Given the FCA's importance as the nation's primary tool for combating government fraud, and given the enormous impact Rule 9(b) has had on cases brought under the FCA, this Court should grant certiorari to clarify the proper relationship between Rule 9(b) and the False Claims Act.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Counsel for Petitioner

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11868
Non-Argument Calendar

D.C. Docket No. 98-00204-CV-ODE-1

KIRK S. CORSELLO,

Plaintiff-Appellant,

versus

LINCARE, INC.,
LINCARE HOLDINGS, INC.,
ROTECH, INC.,
ALAN VARRAUX, M.D.,
ROTECH MEDICAL
CORPORATION,

Defendants-Appellees,

LINCARE HEALTHCARE
GROUP, INC., AMERICAN
HOME PATIENT, INC., et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

(October 20, 2005)

Before TJOFLAT, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

The issue in this *qui tam* action, brought under the False Claims Act, is whether a former sales employee of multiple defendants pleaded fraud with particularity, under Federal Rule of Civil Procedure 9(b), by baldly asserting that improper practices "resulted in the submission of false claims." Kirk S. Corsello appeals both the dismissal of his complaint for failure to plead fraud with particularity and the denial of his motion to file a third amended complaint. Because the complaint failed to provide any factual support that false claims were actually submitted to the government and a third amendment of the complaint more than five years after the commencement of this action would have been futile, we affirm.

I. BACKGROUND

In 1998, Corsello brought a *qui tam* action under the False Claims Act against 56 entities and 99 John Does and John Doe Corporations. Corsello alleged that while he was employed by two of the defendants, they engaged in various fraudulent schemes, including paying illegal kickbacks to physicians to induce referrals, falsifying certificates of medical necessity to provide unnecessary treatment, and billing for unnecessary or non-existent treatment to obtain Medicare payments unlawfully. Corsello failed to serve process on the defendants with his original complaint, but instead moved to file an amended complaint. On June 18, 1999, the district court granted Corsello's motion to file an amended complaint but warned Corsello that "[t]he *Qui Tam* Act was not enacted in order to give the relator an unlimited opportunity to perfect its complaint" and that "the amended complaint shall fully

comport with the requirement of [Federal Rule of Civil Procedure 9(b)]." Corsello served the first amended complaint on July 18, 1999, but then filed a second amended complaint on January 13, 2000, to cure some of the deficiencies in his earlier complaints and further reduce the number of defendants.

In his amended complaint, Corsello alleged that Lincare, Inc., Lincare Holdings, Inc., Rotech, Inc., Alan Varraux, M.D., Rotech Medical Corporation, and American Home Patient, Inc., violated the False Claims Act by submitting false Medicare claims and conspiring to defraud the government. 31 U.S.C. § 3729(a)(1), (a)(2), (a)(3). Lincare, Inc., and Lincare Holdings, Inc. (collectively Lincare), Rotech, Inc., and Rotech Medical Corporation (collectively Rotech), and American Home Patient, Inc., are nationwide providers of oxygen services and equipment to patients in their homes. Varraux is a physician specializing in pulmonology. Corsello was employed by Lincare as the Center Manager for the South Orlando Center from 1995 to 1997. After Corsello was terminated by Lincare, he worked for Rotech as a Regional Sales Support employee from 1998 until his termination in 1999.

On March 9, 2001, the district court granted a motion to dismiss Corsello's claims against Lincare, American Home Patient, Inc., and Varraux because Corsello failed to plead fraud with particularity. Corsello appealed, but this Court dismissed the appeal because the district court had not yet adjudicated Corsello's claims against Rotech. Rotech then moved to dismiss the second amended complaint for failure to state a claim. Corsello responded to Rotech's motion to dismiss and proposed to file a third amended complaint. The district court granted the motion to dismiss on the ground that Corsello's complaint failed to

plead fraud with particularity. The district court also denied Corsello's motion to file a third amended complaint because Corsello had waited over a year since the dismissal of his claims against the other defendants, had not explained why he did not plead the necessary facts in the previous versions of his complaint, and had not offered an amendment that cured the deficiencies of his complaint.

II. STANDARD OF REVIEW

This appeal is governed by two standards of review. First, this Court reviews *de novo* a dismissal for failure to state a claim upon which relief may be granted. *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1307 n. 11 (11th Cir. 2002). On a motion to dismiss for failure to state a claim, we accept as true the facts as alleged in the complaint. *Id.* at 1303 n.2. Second, we review the denial of a motion to amend a complaint for abuse of discretion. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). The underlying legal conclusion of whether a particular amendment to the complaint would have been futile is reviewed *de novo*. *See Harris v. Ivax Corp.*, 182 F.3d 799, 802-03 (11th Cir. 1999).

III. DISCUSSION

Corsello appeals both the dismissal of his complaint and the denial of his motion to amend the complaint. We first consider whether the district court erred in dismissing Corsello's claims under the False Claims Act for failure to plead fraud with particularity. We then address whether the district court erred in denying Corsello's motion to file a third amended complaint.

A. The District Court Correctly Dismissed the Complaint for Failure to Comply with Rule 9(b)

Sections 3729(a)(1) and (a)(2) of the False Claims Act subject to civil liability entities that knowingly submit false or fraudulent claims to the government for payment or approval. *Clausen*, 290 F.3d at 1309. Liability under the False Claims Act arises from the submission of a fraudulent claim to the government, not the disregard of government regulations or failure to maintain proper internal policies. *Id.* at 1311. The act of submitting a fraudulent claim to the government is the "*sine qua non* of a False Claims Act violation." *Id.* This Court has held that complaints alleging violations of the False Claims Act are governed by Rule 9(b). *Clausen*, 290 F.3d at 1308-09.

Under Rule 9(b), "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). To state a claim under the False Claims Act with particularity, the complaint must allege " 'facts as to time, place, and substance of the defendant's alleged fraud,' [and] 'the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them.' " *Clausen*, 290 F.3d at 1310 (citing *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567-68 (11th Cir. 1994)). Failure to satisfy Rule 9(b) is a ground for dismissal of a complaint.

In *Clausen*, we stated that the complaint must contain "some indicia of reliability" to satisfy Rule 9(b). 290 F.3d at 1311. In that case, Clausen, who was a competitor of the defendant, brought an action under the False Claims Act and alleged that the defendant had engaged in a "decade-long campaign to defraud the Government." *Id.* at 1302-03. Although Clausen described in detail a private scheme to

defraud, Clausen's complaint did not provide "any billing information to support [Clausen's] allegation that actual false claims were submitted for payment." *Id.* at 1306. The complaint speculated that claims "must have been submitted, were likely submitted or should have been submitted to the Government." *Id.* at 1311. The complaint did not contain any "stated reason for [Clausen's] belief that claims requesting illegal payments must have been submitted." Because Clausen was a "corporate outsider," his failure to include a credible set of facts to support his vague allegations rendered his complaint deficient under Rule 9(b). *Id.*

In *Hill v. Morehouse Medical Associates*, an unpublished opinion, we elaborated on the "indicia of reliability" required by *Clausen*. No. 02-14429 (11th Cir. Aug. 15, 2003) (per curiam). Hill, who was a former employee in the billing department of the defendant, alleged a billing process and details about five fraudulent billing schemes the defendant used to submit claims to the government. *Id.* Unlike the relator in *Clausen*, who was a "corporate outsider," Hill had "firsthand information" about the billing practices of the defendant. *Id.* at 5. Because Hill "worked in the very department where she alleged the fraudulent billing schemes occurred," her allegations that fraudulent claims were submitted on a daily basis were factually credible. This Court held that Hill's complaint satisfied Rule 9(b) because Hill was "privy to . . . the internal billing practices" of the defendant and thus provided factual support for the allegations of fraudulent billing in her complaint. *Id.* at 5.

Corsello is neither a "corporate outsider" nor an employee in the billing department. Corsello contends that he is unlike the relator in *Clausen* because, as a sales

employee, he was "aware" of the manner by which the defendants submitted fraudulent claims and had "learned from his colleagues the national reach of the schemes." Corsello also argues that his second amended complaint, like the complaint in *Hill*, contained "indicia of reliability" to satisfy Rule 9(b) because the complaint alleged many details of numerous schemes, employees, and claims. Corsello argues that the complaint provided the initials of patients whose Medicare forms were improperly completed and eventually, Corsello alleged, "resulted in the submission of fraudulent claims."

Corsello argues that a pattern of improper practices of the defendants leads to the inference that fraudulent claims were submitted to the government, but we disagree. Because it is the submission of a fraudulent claim that gives rise to liability under the False Claims Act, that submission must be pleaded with particularity and not inferred from the circumstances. *See* Fed. R. Civ. P. 9(b) (stating that "the circumstances constituting fraud . . . shall be stated with particularity"). Although we construe all facts in favor of the plaintiff when reviewing a motion to dismiss, we decline to make inferences about the submission of fraudulent claims because such an assumption would "strip[] all meaning from Rule 9(b)'s requirements of specificity." *Clausen*, 290 F.3d at 1312 n.21.

Corsello's complaint failed to satisfy 9(b). Corsello's second amended complaint failed to allege when, where, and what violations of the False Claims Act occurred. The complaint instead used vague allegations that improper practices took place "everywhere Lincare does business throughout the statutory time period." The allegations also failed to provide a factual basis to conclude fraudulent claims were ever actually submitted to the government in

violation of the False Claims Act. At best, Corsello alleged that improper practices have "resulted in the submission of fraudulent claims," or "lead directly to the submission of fraudulent claims."

Although Corsello worked in sales, his allegations, often based "on information and belief," lacked the "indicia of reliability" required by *Clausen* because they failed to provide an underlying basis for Corsello's assertions. Corsello did not explain why he believes fraudulent claims were ultimately submitted. Corsello's contention that he was "aware" of billing practices was neither particular to any specific fraudulent claim against the government nor factually supported because Corsello conceded that he "did not have access to company files outside his own offices." Underlying improper practices alone are insufficient to state a claim under the False Claims Act absent allegations that a specific fraudulent claim was in fact submitted to the government. *Clausen*, 290 F.3d at 1311. In short, Corsello provided the "who," "what," "where," "when," and "how" of improper practices, but he failed to allege the "who," "what," "where," "when," and "how" of fraudulent submissions to the government.

Corsello's allegation that the defendants conspired to defraud the government in violation of section 3729(a)(3) of the False Claims Act likewise failed to satisfy the requirements of Rule 9(b). To state a claim under section 3729(a)(3), the plaintiff must show "(1) that the defendant conspired with one or more persons to get a false or fraudulent claim paid by the United States; (2) that one or more of the conspirators performed any act to effect the object of the conspiracy; and (3) that the United States suffered damages as a result of the false or fraudulent claim." *United States ex rel. Stinson v. Provident Life &*

Accident Ins. Co., 721 F. Supp. 1247, 1259 (S.D. Fla. 1989). Section 3729(a)(3) of the False Claims Act imposes liability on those who "conspire[] to defraud the government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). In his second amended complaint, Corsello alleged that "Lincare and Varraux conspired to defraud the Government," but this bare legal conclusion was unsupported by specific allegations of any agreement or overt act. The district court correctly dismissed Corsello's complaint for failure to comply with Rule 9(b).

B. The District Court Did Not Abuse Its Discretion When It Denied Corsello's Motion to File a Third Amended Complaint

Corsello also argues that the district court erred when it denied his motion to file a third amended complaint. Under Federal Rule of Civil Procedure 15(a), a court should give leave to amend freely "when justice so requires." Fed. R. Civ. P. 15(a). Ordinarily, a party must be given at least one opportunity to amend before the district court dismisses the complaint. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). The district court, however, need not "allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Id.*

The district court did not abuse its discretion when it denied Corsello's motion to amend his complaint. Allowing another amendment would have led to the filing of Corsello's fourth complaint in over five years of litigation. Corsello proposed to file his third amended complaint

eighteen months after the district court had dismissed Corsello's claims against Lincare, American Home Patient, and Varraux. The district court had warned Corsello from the beginning that he must plead fraud with particularity and was not required to give Corsello another opportunity to correct his errors. Corsello's "repeated failure to cure deficiencies by [previous] amendments" is an explicitly permitted reason for which the district court was entitled to deny his motion to amend. *See id.*

Corsello erroneously argues that the motion to file a third amended complaint was delayed because of our decision in *Clausen*. Corsello does not explain why he moved to amend five months after the *Clausen* decision was issued. Moreover, *Clausen* did not articulate a new standard that required an extensive amendment to Corsello's complaint; *Clausen* interpreted an existing standard that Corsello had failed to meet.

The district court also did not err when it determined that allowing Corsello to amend his complaint would have been futile, because Corsello's proposed complaint still failed to meet the standard of Rule 9(b). The deficiencies of the second amended complaint remained in the proposed complaint: the allegations of the proposed complaint were unlimited in temporal or geographic scope and failed to plead specific instances of fraudulent submissions to the government. In addition, the proposed complaint alleged that "sales people do not . . . have access to the specific billing information that is submitted to the government," which evidenced that the revised complaint still lacked sufficient indicia of reliability. The district court, therefore, did not abuse its discretion when it denied Corsello's motion to amend.

IV. CONCLUSION

Because Corsello's complaint failed to plead fraud with particularity and the district court did not abuse its discretion when it denied Corsello's motion to file a third amended complaint, the dismissal of Corsello's second amended complaint and the denial of his motion to amend that complaint are

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA ex rel. KIRK S. CORSELLO and KIRK S. CORSELLO, Plaintiffs v. LINCARE, INC., LINCARE HOLDINGS INC., AMERICAN HOMEPATIENT, INC., ROTECH INC., and ALAN VARRAUX, M.D., Defendants	CIVIL ACTION NO. 1:98-CV-0204-ODE

ORDER

(Filed Jun. 2, 2003)

This *qui tam* civil action, filed pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, is before the Court on Defendant Rotech Inc.'s motion to dismiss Relator Corsello's second amended complaint and Relator Corsello's motion for relief from the Court's order dismissing the second amended complaint with regard to Defendants Lincare, Inc., Lincare Holdings Inc., American HomePatient, Inc. and Alan Varraux and motion to amend the second amended complaint. For the reasons stated below, Defendant's motion to dismiss is GRANTED in part and DENIED in part; Relator's motion for relief from the Court's order dismissing the second amended complaint with regard to Defendants Lincare, Inc., Lincare Holdings Inc., American HomePatient, Inc. and Alan Varraux is

GRANTED in part and DENIED in part; and Relator's motion to amend the second amended complaint is DENIED.

I. Background

Relator brought this action on January 22, 1998, under the False Claims Act, 31 U.S.C. § 3729 *et seq.* Relator alleges that Defendants engaged in Medicare fraud against the United States government through various fraudulent schemes designed to obtain Medicare payments unlawfully. Relator further alleges that he was illegally terminated in retaliation for the filing of this suit. The United States has not intervened in this case.

On June 18, 1999, this Court granted Relator's motion to file an amended complaint. Relator served his first amended complaint on July 14, 1999. In an apparent attempt to cure some of the deficiencies in his first amended complaint, Relator then filed a second amended complaint on January 13, 2000, reducing the number of named defendants[1] to include Lincare, Inc., Lincare Holdings Inc., Rotech Medical Corporation, American HomePatient, Inc., and Dr. Alan Varraux.

Lincare Inc. and Lincare Holdings Inc. ["Lincare"],[2] American HomePatient, and Rotech are nationwide providers of durable medical equipment and home health

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[1] Originally, Relator named fifty-six entities and ninety-nine John Doe(s) and John Doe corporations as defendants.

[2] In his pleadings, Relator refers to Lincare, Inc. and Lincare Holdings, Inc. collectively as "Lincare." Because it is impossible to ascertain to which Lincare entity Relator refers, the Court will likewise refer to both entities collectively.

services. Varraux is a physician specializing in pulmonology who allegedly had a medical director agreement with Lincare. Relator states that he was employed by Lincare as a Center Manager for the south Orlando Center from August 15, 1995 through December 19, 1997. Compl. ¶ 5. Additionally, Relator asserts that he was employed by Rotech as a Regional Sales Support person from August, 1998, through November 4, 1999. *Id.* Based upon information allegedly obtained during his employment with Lincare and Rotech, Relator asserts that Defendants engaged in various schemes resulting in violations of the False Claims Act.

In his second amended complaint, Relator asserts three counts of False Claims Act violations based on these allegedly fraudulent schemes. In Count I, Relator alleges that all Defendants violated 31 U.S.C. § 3729(a)(1) and (a)(2)[3] by presenting false claims for payment and by submitting false records or statements for the purpose of payment of false claims. *See* Compl. ¶¶ 189-96. In Count

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[3] In relevant part, 31 U.S.C. § 3729(a) provides:

> Any person who –
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

II, Relator alleges that Defendant Lincare terminated him in violation of 31 U.S.C. § 3730(h).[4] *See id.* ¶¶ 197-200. Count III is an identical retaliation claim against Defendant Rotech. *See* Compl. ¶ 201-04.

Lincare and American HomePatient each filed separate motions to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). Varraux, proceeding *pro se*, adopted Lincare's motion to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). In an order dated March 29, 2001, the undersigned granted these motions to dismiss, finding that Relator had failed to plead fraud with particularity as mandated by Federal Rule of Civil Procedure 9(b) and as previously directed by this Court.[5]

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[4] In relevant part, section 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

[5] In the order granting Relator's motion to file an amended complaint, the Court cautioned Relator as follows:

> The *Qui Tam* Act was not enacted in order to give the relator an unlimited opportunity to perfect its complaint or the

(Continued on following page)

II. Defendant Rotech's Motion to Dismiss

Defendant Rotech, having filed a notice of bankruptcy stay on February 25, 2000, did not file a motion to dismiss at that time. According to Rotech, its reorganization plan was confirmed by the Bankruptcy Court for the District of Delaware on February 13, 2002, and the stay has now been terminated. In its currently pending motion to dismiss, Defendant Rotech argues that because the allegations against it are almost identical to the allegations raised against Defendants Lincare and American HomePatient, Inc., the allegations against Defendant Rotech must also be dismissed. While the Federal Rules of Civil Procedure generally require in a complaint only a short and plain statement of the cause of action, Rule 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of a mind of a person may be averred generally." Fed.R.Civ.P. 9(b). In addition to providing adequate notice to enable defendants to frame a response, this heightened

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government an unlimited opportunity to elect to intervene. However, in consideration of judicial economy and in light of the fact that none of the parties to this action have yet been served, the court hereby GRANTS Plaintiff's motion for leave to amend the complaint. Plaintiff shall submit an amended complaint within ten (10) days of the entry of this order. The amended complaint shall fully comport with the requirement of Fed.R.Civ.P. 9(b), which requires that fraud be plead with specificity. The plaintiffs complaint must allege the details of the defendant's allegedly fraudulent acts, when they occurred, and who engaged in them. *Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d 562, 568 (11th Cir. 1994). There will be no further extensions of time.

United States ex rel. Corsello v. Lincare. Inc., No. 1:98-CV-0204-ODE, slip op. at 2 (N.D. Ga. June 18, 1999).

standard serves to protect defendants from frivolous suits, to preclude fraud actions based upon facts obtained through discovery after the complaint is filed, and to prevent the damage to the goodwill and reputation of defendants that may result from even meritless claims. *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F.Supp. 1040, 1053 (S.D. Ga. 1990). Rule 9(b) may be satisfied if the complaint sets forth:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
>
> (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants "obtained as a consequence of the fraud.

Brooks v. Blue Cross and Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997) (citations omitted); *see also Leonard v. Stuzzi-James Co., Inc.*, 742 F.Supp. 653, 659 (N.D. Ga. 1990) (granting motion to dismiss where complaint failed to allege "specifically when, where, by whom, or specifically what the representation was").

Applying this standard, this Court finds that Relators second amended complaint as against Defendant Rotech falls short of compliance with the requirements of Rule 9(b). Relator alleges that Defendant Rotech employed the following methods to defraud the Medicare system: (1) improper testing and qualification of patients for certain services by falsifying diagnoses and/or test results,

manipulating tests to achieve a qualifying result, and qualification of patients by Defendants rather than an independent medical practitioner; (2) delivery of excess and unneeded unit dose medications; (3) re-renting equipment which has already been fully paid for by Medicare (referred to as "capped" equipment); (4) billing Medicare for durable medical equipment (DME) no longer in use by the patient; (5) charging Medicare more than private insurance companies are charged for the same services; (6) "unbundling" prescriptions for respiratory medicines so that Defendants could bill the government for the medicines separately; (7) converting Medicare patients to motorized wheelchairs, regardless of medical necessity, which can be billed at a higher rate; and (8) billing Medicare for nursing home patients in Oklahoma that did not exist. Relator alleges that Defendants engaged in the following schemes to circumvent the statutory safeguards intended to prevent these types of fraudulent claims: (1) kickbacks to physicians to induce referrals and falsification of documentation; (2) waiver of patients' 20% co-payment for oxygen services in the absence of any hardship to avoid patients, objections to overcharges or unnecessary equipment or medicine; (3) falsification, forgery, or illegal completion of certificates of medical necessity ["CMN"] to enable the provision of unnecessary treatment and services; and (4) "trolling" for Medicare patients by reviewing physician files to identify patients who may be eligible for oxygen services.

However, Relator never sufficiently alleges the submission of a false claim for payment to the government, the sine qua non of a False Claims Act violation. Instead, Relator seeks to frame his False Claims Act suit by generally alleging fraudulent practices which, in theory, could

lead to the submission of false claims. This manner of pleading is not contemplated by the False Claims Act. *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301 (2002) (upholding dismissal of False Claims Act count for failure to specify when and through which procedure each false claim was submitted for payment).

In *Clausen,* the United States Court of Appeals for the Eleventh Circuit clearly establishes the specificity required of False Claims Act allegations:

> Rule 9(b)[ ] . . . does not permit a False Claim Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government. . . . [I]f Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of *an actual false claim* for payment being made to the Government.

Id. at 1311. This standard may be satisfied by information such as the amount and actual dates of submitted charges, policies about billing or even second-handed information about billing practices, or copies of bills or payments. *Id.* at 1312. While not all of these details are required, "some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b)." *Id.* at 1312 n.21.

The sparse details contained in the instant complaint do not adequately specify the what, when, and where of any claim submission. Instead, Relator alleges generally that Defendant Rotech provided services to Medicare patients and was required to obtain certain documentation – namely, the CMNs – to be reimbursed for such services.

Relator goes on to specifically allege facts surrounding the falsification of such documentation. For example, Relator alleges that Rotech made direct cash payments to referring physicians and/or members of their staff in Texas from December 1996 through January 1999 to induce referrals or the falsification of documentation. Compl. ¶ 25. Although Relator cites four doctors and two Defendant employees who allegedly engaged in the kickback scheme, this example does not adequately support an allegation otherwise unlimited in time and geography that Defendants used the kickback scheme to submit false claims. Nor are Relator's allegations with respect to the provision of free or below market tests and services sufficiently specific. Relator alleges that two Rotech employees indicated that they would offer to provide free services to medical professionals but allow the professionals to bill for the services. *Id.* ¶ 29. However, Relator fails to allege that the free services were actually provided or that the medical professionals submitted fraudulent bills based on these services. Relator further alleges that Defendant entered into medical director agreements with two referring physicians in Texas who allegedly received "a monthly fee" pursuant to this referral scheme. *Id.*, ¶ 44. Given the breadth of the allegation, this solitary detail is not adequate.

In any case, even if sufficient facts were alleged to support these claims that such schemes existed, Relator's failure to allege the presentation of a false claim precludes liability under the False Claims Act for such acts. *Clausen,* 290 F.3d at 1313 n.24. Relator alleges that based on his personal experience, Rotech provided equipment and services to patients pursuant to CMNs, *see* Compl. ¶¶ 13, 23, 53, 60-63, 65, and that Rotech was required to obtain

CMNs to obtain reimbursement for the provision of equipment and services to government aid recipients. *Id.* ¶¶ 18-20, 52. However, that Rotech provided services pursuant to CMNs and that CMNs were required for reimbursement does not, without more, establish that Rotech submitted false claims. "The False Claims Act does not create liability merely for a health care providers disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe." *Clausen,* 290 F.3d at 1311. Relator fails to make the necessary link between the alleged obtaining of false CMNs and the submission of any claims for payment and thus has failed to identify any claims for payment predicated on the allegedly false CMNs. Simply put, Relator never alleges any facts with respect to the actual submission of false claims to the government.

Relator provides details such as patient initials and general dates with respect to allegations that Defendant Rotech re-rented capped equipment, billed Medicare for equipment no longer in use, and converted patients to motorized wheelchairs and alleges that Defendant Rotech billed the government for these services and for non-existent nursing home patients in Oklahoma. Compl. ¶¶ 128, 133, 164, 169. These averments arguably constitute allegations that specific claims were submitted; however, Relator wholly fails to allege any factual basis to support the allegations of the actual submission of claims. Relator, as a Rotech employee, may have acquired knowledge about Rotech's billing practices. However, Relator himself indicates that he was employed in a sales position and provides no factual support for his alleged knowledge of billing practices, much less for the specific claims which

he asserts were submitted to the government in the above-cited paragraphs. Indeed, Relator claims that he was a Rotech "insider" but fails to allege a factual basis for his claimed knowledge of Rotech's billing policies, other than that Rotech used CMNs in the provision of services and equipment. Rel.'s opp'n to Def. Rotech's Mot. Dismiss at 12. Relator has thus failed to provide the "indicia of reliability" required to satisfy Rule 9(b). *Clausen,* 290 F.3d at 1311; *U.S. ex rel. Carroll v. JFK Medical Center,* 2002 WL 31941007 (dismissing insider's False Claim Act suit for lack of specificity where allegations failed to provide facts, such as the costs of allegedly fraudulent procedures, to buttress the claims that defendants actually used fraudulent schemes to submit false claims).

Relator's argument that the information lacking here is exclusively held by Defendants so as to trigger a relaxed Rule 9(b) standard is unavailing. In *Clausen,* the Eleventh Circuit rejected such an argument, finding that the relator was not without avenues for obtaining the information and that in any case, the relator was not entitled to such leniency because he had not adequately alleged that the information was inaccessible nor plead any facts to support such allegation. *Id.* at 1314 n.25. Similarly, in this case Relator did not allege in the complaint that information with respect to the actual submission of claims to the government was within the exclusive control of Defendant.

Relator argues in the alternative that his allegation that Rotech created false documents is sufficient to state a claim under § 3729(a)(2) of the False Claims Act even in the absence of presentation of claims to the government. Relator relies on the holding in *BMY Combat Sys. Div. of Harsco Corp. v. U.S.,* as Fed. Cl. 109 (Fed. Cl. 1997), in which the United States Court of Federal Claims held that

actual delivery of false records is not necessary for a False Claims Act violation for false records to attach. However, that case is easily distinguishable from the instant facts: in *BMY Combat,* although the claimant did not actually give copies of the fraudulent documents to the government, the claimant induced the government's reliance by explicitly stating that the fraudulent forms existed as supporting documents for a proposition that the claimant knew to be false. *Id.* at 126. In this case, there is no allegation that Rotech ever made a specific, explicit representation to the government with respect to a fraudulent document.

However, Relator also argues that even if the Court finds that he has failed to state a cause of action under Rule 9(b) for violations of 31 U.S.C. §§ 3729(a)(1)-(2), his claim of retaliatory discharge is not subject to Rule 9(b) requirements and thus should not be dismissed. Relator alleges that he was terminated in retaliation for the filing of this suit in violation of 31 U.S.C. § 3730(h), which provides relief for employees who are terminated in retaliation for acts in relation to proceedings covered by the False Claims Act. An employee seeking relief under section 3730(h) must prove that he engaged in protected conduct and that the defendant retaliated against her because of that protected conduct. *Mann v. Olsten Certified Healthcare Corp.,* 49 F.Supp.2d 1307, 1313 (M.D.Ala. 1999).

In this case, Relator has alleged sufficient facts to establish that he was engaged in a protected activity when he was terminated. Specifically, Relator alleges that he brought this action while employed by Rotech and that when Rotech learned of the Relator's involvement, his employment was terminated. Compl. ¶¶ 180-82. These

allegations are sufficient to state a claim under section 3730(h). *See Hutchins v. Wilentz, Goldman & Spitzer,* 253 F.3d 176, 186 (3d Cir. 2001) (stating elements of retaliation claim as evidence that (1) the employee took acts in furtherance of a *qui tam* suit; (2) the employer knew of these acts; and (3) his employer discharged him as a result of these acts); *Zahodnick v. Int'l Bus. Machines, Corp.,* 135 F.3d 911, 914 (4th Cir. 1997) (same).[6]

Defendant Rotech argues that Relator cannot state a claim for retaliation in the absence of a viable claim of a substantive False Claims Act violation. However, the Eleventh Circuit has held that a relator need not actually file a complaint to state a claim of retaliation. *Childree v. UAP/GM CHEM. Inc.,* 92 F.3d 1140, 1146 (11th Cir. 1996). It follows that the retaliation protection does not depend on the success of the False Claims Act suit, as an actual suit is not required. Rather, retaliation protection is available not only when a suit is filed but also "where the filing of such an action, by either the employee or the government, was a 'distinct possibility' at the time the assistance was rendered." *Id.* Thus, a relator need not have a viable claim of fraudulent billing to state a cause of action but must only take action in furtherance of that claim and suffer adverse employment action as a consequence. *Cf. U.S. ex rel. Yesudian v. Howard Univ.,* 153 F.3d 731, 739-40 (D.C.Cir. 1998) (holding that the protected

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[6] Defendant Rotech contends that Relator never properly alleged that this *qui tam* action was the basis for the termination of Relator's employment and thus fails to adequately plead a retaliation claim. However, the Court finds that Relator's statement that Defendant Rotech fired him after discovering that he had filed a sealed *qui tam* action against the company is sufficient to support the claim that the *qui tam* action was the basis for his termination.

conduct element of a retaliation claim does not require the plaintiff to have developed a winning *qui tam* action before he is retaliated against); *U.S. ex rel. Satalich v. City of Los Angeles,* 160 F.Supp.2d 1092, 1108 (C.D.Cal. 2001) (holding that employee-whistleblower's retaliation claim was not dependent on his ability to succeed on, or even file, a cause of action under section 3729). Accordingly, Relator's retaliation claim may go forward despite the dismissal of the underlying False Claims Act allegations.

Because Relator's general allegations that the falsification of these documents led to the submission of false claims are insufficient to state a False Claims Act violation, Relator's specificity with respect to the falsification of the CMNs notwithstanding, Rotech's motion to dismiss is GRANTED with respect to Count I of the complaint. However, because Relator adequately pleaded a retaliation claim, Rotech's motion to dismiss is DENIED with respect to Count III of the complaint.

III. Relator's Motions for Relief from Judgement and to Amend the Complaint

Relator first seeks relief from the order dismissing the second amended complaint with regard to Defendants Lincare, Inc., Lincare Holdings Inc., American HomePatient, Inc. and Alan Varraux. Relator argues that since this Court issued that order, the Eleventh Circuit has clarified the law with respect to the specificity required of False Claim Act complaints and that the Court should therefore withdraw the order dismissing the other Defendants and allow Relator to amend the complaint a fourth time to satisfy the standard as stated in the *Clausen* opinion.

Because the complaint has not been dismissed with prejudice as to all Defendants, the order dismissing Lincare, American HomePatient, and Varraux is not final and thus may be revised at any time. F.R.C.P. 54(b) (noting that an order addressing fewer than all parties or claims is "subject to revision at any time"); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970);[7] *Brodgen ex rel. Cline v. Nat'l Healthcare Corp.*, 103 F.Supp.2d 1322, 1338 (N.D.Ga. 2000). Reconsideration of an interlocutory decision is available under the standard, "as justice requires." Fed. R. Civ. P. 60 advisory committees note; *see also Canaday v. Household Servs., Inc.*, 119 F.Supp.2d 1258, 1260 (M.D.Ala. 2000) (holding that the trial court may reconsider or reverse its decision on an interlocutory order for any reason it deems sufficient). The Eleventh Circuits decision in *Clausen* does not constitute a circumstance mandating the relief Relator seeks with respect to the substantive False Claim Act violations. The decision did not change the law. Although the Eleventh Circuit issued the *Clausen* opinion in May, Relator did not attempt to amend the complaint until November. Further, Relator does not explain why he failed to allege the added detail of the proposed third amended complaint in any of the three previous complaints. Finally, the detail Relator seeks to add would not ameliorate the deficiencies which required the dismissal of second amended complaint. Relator simply fails to allege an adequate factual basis to

[7] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

support his assertions that fraudulent claims were submitted to the government.[8]

However, Relator also pleaded a retaliation claim against Defendant Lincare similar to the retaliation claim against Rotech. Compl. ¶¶ 197-200. The order dismissing the second amended complaint against Lincare did not specifically address Relator's retaliation claim. Because the Court finds that Relator sufficiently states a claim for retaliation against both Rotech and Lincare, the Court modifies its previous order pursuant to Rule 54(b) to allow Relator's retaliation claim against Lincare to proceed.

Finally, Relator seeks to amend the second amended complaint, purportedly to add the detail found lacking in that pleading. To date, Relator has had three opportunities to perfect his complaint. Additionally, this Court has previously advised Relator to comply with the requirements of Rule 9(b). *See U.S. ex rel. Corsello v. Lincare, Inc.*, No. 1:98-CV-0204-ODE, slip op. at 2 (N.D. Ga. June 18, 1999). Although "a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice," the Court need not provide Relator with unlimited opportunities to correct his

[8] Relator argues in his motion to amend the complaint that he establishes a satisfactory indicia of reliability in the proposed third amended complaint by alleging that he cannot possibly identify billing detail because Defendant maintained its billing departments in remote locations. The Court does not see how this asserted complete lack of knowledge corroborates his claim. Further, although the allegation that the billing records are within Defendants' exclusive control suggests the application of a more lenient standard under Rule 9(b), Relator simply fails to allege adequate facts with respect to his employment at Rotech to support a relaxed specificity requirement.

complaint. *Bank v. Pitt,* 928 F.2d 1108, 1112 (11th Cir. 1991).

In determining whether to grant a motion to amend a pleading, the district court may consider such factors as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis,* 371 U.S. 178, 182 (1962); *Nelson v. Doe,* 156 F.R.D. 583, 583 (N.D.Ga. 1995). As noted above, Relator waited over a year from the time the complaint was dismissed against the other defendants and six months from the issuance of the *Clausen* opinion to attempt to amend the complaint, has failed to adequately explain why he has failed to allege the added detail in any of the three previous complaints, and does not ameliorate with the proposed amendment the deficiencies which required that the second amended complaint be dismissed. Allowing Relator to amend the complaint at this point would certainly be inappropriate, given that Relator has unduly delayed the amendment and that an amendment would cause undue prejudice to the opposing party. *See* Fed. R. Civ. P 15(a). Accordingly, Relator's motion to amend the second amended complaint is denied.

IV. Conclusion

For the reasons stated above, Defendant Rotech's motion to dismiss is GRANTED with respect to Count I and DENIED with respect to Count III; Relator's motion for relief from the Court's order dismissing the second amended complaint with regard to Defendants Lincare,

Inc., Lincare Holdings Inc., American HomePatient, Inc. and Alan Varraux is GRANTED with respect to Count II as against the Lincare Defendants and DENIED as against the remaining Defendants; and Relators motion to amend the second amended complaint is DENIED.

SO ORDERED, this 30 day of MAY, 2003.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA ex rel. KIRK S. CORSELLO, and KIRK S. CORSELLO, Plaintiffs, v. LINCARE, INC.; LINCARE HOLDINGS INC.; AMERICAN HOMEPATIENT, INC.; ROTECH INC.; and ALAN VARRAUX, M.D.; Defendants.	CIVIL ACTION NO. 1:98-cv-0204-ODE

ORDER

(Filed Mar 9, 2001)

This *qui tam* civil action, filed pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, is before the court on (1) American HomePatient, Inc.'s ("American HomePatient" or "Defendant") motion to dismiss Relator's second amended complaint for failure to comply with Federal Rule of Civil Procedure 9(b) and for failure to state a claim; (2) Lincare Inc. and Lincare Holdings Inc.'s ("Lincare" or "Defendant") renewed motion to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6); (3) Lincare's motion to dismiss qui tam claims on constitutional grounds; (4) Lincare's motion to file a supplemental brief in light of new authority; (5) Lincare's motion to dismiss pursuant to 31 U.S.C. § 3730(b)(5) and Federal Rule of Civil Procedure 12(b)(1); and (6) Lincare's motion for leave to file supplemental brief in light of *Clausen* decision. All motions are opposed by Relator Kirk S.

Corsello ("Relator") For the reasons set forth below, Defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 9(b) and 12(b)(6) are granted, Lincare's motion to file a supplemental brief in light of new authority and motion for leave to file supplemental brief in light of *Clausen* decision are granted nunc pro tunc, and Lincare's motion to dismiss qui tam claims on constitutional grounds and motion to dismiss pursuant to 31 U.S.C. § 3730(b)(5) and Federal Rule of Civil Procedure 12(b)(1) are dismissed as moot.

Relator brought this action on January 22, 1998 under the False Claims Act, 31 U.S.C. § 3729 *et seq.* He alleges that Defendants[1] engaged in Medicare fraud against the United States government through various fraudulent "schemes" designed to obtain Medicare payments unlawfully. Relator does not allege that he has been personally injured by Defendants' alleged actions, but only that the United States government has been harmed. The United States has not intervened in this case.

The complaint was unsealed and service was authorized on November 6, 1998. However, Relator failed to perfect service on any of the Defendants. On June 18, 1999, the court granted Relator's motion to file an amended complaint, but cautioned Relator as follows:

> The *Qui Tam* Act was not enacted in order to give the relator an unlimited opportunity to perfect its complaint or the government an unlimited opportunity to elect to intervene. However, in consideration of judicial economy and in light of

[1] Originally, Relator named fifty-six entities and ninety-nine John Does and John Doe Corporations as defendants.

> the fact that none of the parties to this action have yet been served, the court hereby GRANTS Plaintiff's motion for leave to amend the complaint. Plaintiff shall submit an amended complaint within ten (10) days of the entry of this order. *The amended complaint shall fully comport with the requirement of Fed.R.Civ.P. 9(b), which requires that fraud be plead with specificity.* "The plaintiff's complaint must allege the details of the defendant's allegedly frauduent acts, when they occurred, and who engaged in them." *Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d 562, 568 (11th Cir. 1994). There will be no further extensions of time.

United States ex rel. Corsello v. Lincare. Inc., No. 1:98-CV-0204-ODE, slip op. at 2 (N.D. Ga. June 18, 1999) (emphasis added). Relator then served his first amended complaint on July 14, 1999 which, *inter alia*, amended the named defendants.

In an apparent attempt to cure some of the alleged deficiencies in his first amended complaint, Relator filed his second amended complaint on January 13, 2000, further reducing the number of named defendants. The remaining Defendants now include Lincare Inc., Lincare Holdings Inc.,[2] Rotech Medical Corporation ("Rotech" or "Defendant"),[3] American HomePatient, Inc., and Alan Varraux. Lincare Inc. and Lincare Holdings Inc. are nationwide providers of oxygen services and equipment to

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[2] In his pleadings, Relator refers to Lincare Inc. and Lincare Holdings, Inc. collectively as "Lincare." Because it is impossible to ascertain to which Lincare entity Relator refers, the court likewise will refer to both entities collectively.

[3] Rotech filed a notice of bankruptcy stay on February 25, 2000.

patients in their homes. Varraux is a physician specializing in pulmonology who allegedly had a medical director/consultant agreement with Lincare. American HomePatient is a nationwide supplier of durable medical equipment.

Relator states that he was employed by Lincare as a Center Manager for the South Orlando Center from August 15, 1995 through December 19, 1997. [Compl. at 2]. Additionally, according to Rotech, Relator obtained employment as a marketing representative for Rotech in Charleston, South Carolina from August, 1998 through November 4, 1998. [*See* Rotech's Mot. to Dismiss Amended Compl. at 4]. Based upon information allegedly obtained during his employment with Lincare and Rotech, Relator asserts that Defendants engaged in the following schemes resulting in violations of the False Claims Act.

Relator alleges that Defendants Lincare, Rotech, and American HomePatient provided illegal kickbacks to physicians to induce referrals of oxygen patients including cash payments, sporting events tickets, free patient services and tests, free or below market value equipment or medicine, and paid medical directorships.

With respect to Rotech and Lincare only, Relator alleges the existence of the following fraudulent schemes: 1) waiver of patients' twenty percent co-payment for oxygen services in the absence of any hardship to avoid patients' objections to overcharges or unnecessary equipment or medicine; (2) falsification, forgery, or illegal completion of certificates of medical necessity ("CMN") to enable the provision of unnecessary treatment and services; (3) improper testing and qualification of patients for certain services by falsifying diagnoses and/or test results,

manipulating tests to achieve a qualifying result, and qualification of patients by Defendants rather than an independent medical practitioner; (4) delivery of excess and unneeded unit dose medications; and (5) "trolling" for Medicare patients by reviewing physician files to identify patients who may be eligible for oxygen services.

Relator alleges that Rotech employed the following methods to defraud the Medicare system: (1) re-renting equipment which has already been fully paid for by Medicare (referred to as "capped" equipment); (2) billing Medicare for durable medical equipment (DME) no longer in use by the patient; (3) charging Medicare more than private insurance companies are charged for the same services; (4) converting Medicare patients to motorized wheelchairs, regardless of medical necessity, which can be billed at a higher rate; and (5) billing Medicare for nursing home patients in Oklahoma that did not exist.

Relator further alleges that Lincare relied on the following practices to submit improper claims for Medicare reimbursement: (1) "unbundling" prescriptions for respiratory medicines to enable Lincare to bill Medicare at a higher rate than that authorized when the medicines are prescribed together; and (2) billing for a full refill of oxygen regardless of the amount of oxygen needed to refill the patients' tanks.

In his second amended complaint, Relator asserts three counts of False Claims Act violations based on the aforementioned allegedly fraudulent schemes. In Count I, Relator alleges that all Defendants violated 31 U.S.C.

§ 3729(a)(1)[4] and (a)(2) by presenting false claims for payment and by submitting false records or statements for the purpose of payment of false claims. [*See* Compl. at 53-54]. Relator further alleges that Defendants Lincare and Varraux conspired to defraud the government by getting false claims allowed or paid in violation of 31 U.S.C. § 3729(a)(3). In Count II, Relator alleges that Defendant Lincare terminated him in violation of 31 U.S.C. § 3730(h).[5] [*See* Compl. at 54]. Count III is an identical retaliation claim against Defendant Rotech. [*See id.* at 55].

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[4] In relevant part, 31 U.S.C. § 3729(a) provides:

Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

[5] In relevant part, that section provides:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee

(Continued on following page)

Lincare and American HomePatient each filed separate motions to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). Additionally, Lincare has filed a motion to file a supplemental brief in light of new authority. Lincare has also filed, and American HomePatient has adopted, the following motions: (1) motion to dismiss qui tam claims on constitutional grounds; (2) motion to dismiss pursuant to 31 U.S.C. § 3730(b) and Federal Rule of Civil Procedure 12(b)(1); and (3) motion to file supplemental brief in light of *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, No. 1:97-CV-2200 TWT, 2000 U.S. Dist. LEXIS 17162 (N.D. Ga. Nov. 29, 2000). The government has filed amicus briefs with respect to Defendants' motions to dismiss for failure to comply with Rule 9(b) and 12(b)(6) and on constitutional grounds. Varraux, proceeding *pro se*, has adopted Lincare's renewed motion to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) and Lincare's motion to dismiss qui tam claims on constitutional grounds.

Turning first to Defendants' motions to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), Defendants maintain that Relator's complaint is deficient in several respects. First, Lincare notes that because Relator refers to Lincare Inc. and Lincare Holdings Inc. collectively as "Lincare," both entities are deprived of proper notice of the allegations levied against

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would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

them. [*See* Lincare's Renewed Mot. to Dismiss Pursuant to Fed.R.Civ.P. 9(b) and 12(b)(6) at 4]. Second, and most significantly, Lincare argues that Relator's "tainted claim theory" fails to sufficiently plead a violation of 31 U.S.C. § 3729(a)(1). Although Relator alleges generally,

> that 'every' claim for payment is 'false' if submitted after some impropriety has occurred, the [second amended complaint] does not identify one single false claim for payment that [Lincare] allegedly submitted to the government, let alone when, where or who submitted such a claim.

[*Id.* at 5]. Instead, the complaint sets forth, in varying degrees of detail, a wide range of Defendants' allegedly fraudulent or illegal practices. Absent allegations of the submission of specific false claims based upon Defendants' alleged misconduct, Lincare contends that Relator's complaint is fatally flawed.

Furthermore, Lincare maintains that the complaint fails to allege that Lincare submitted a false certification of compliance with federal regulations in violation of 31 U.S.C. § 3729(a)(2). Finally, Lincare submits that the complaint is devoid of any facts supporting Relator's conspiracy claim, such as the existence of an agreement between Defendants and Varraux to engage in fraud or evidence of an overt act taken pursuant thereto. [*Id.* at 8]. Having failed to adequately state a violation of the substantive provisions of the False Claims Act, Lincare avers that Relator's retaliatory discharge claim must fall as well. [*Id.* at 10]; *see* 31 U.S.C. § 3730(h).

In its motion to dismiss Relator's second amended complaint for failure to comply with Federal Rule of Civil Procedure 9(b) and for failure to state a claim, American

HomePatient offers similar arguments as to the deficiency of the complaint. Noting that American HomePatient is alleged to have been involved in only two of the numerous "schemes" outlined in the complaint, American HomePatient contends that Relator's allegations lack the factual specificity demanded by Rule 9(b). For example, Relator alleges that American HomePatient provided free medical equipment in exchange for physician referrals nationwide and throughout "the entire statutory time period." [American HomePatient's Mot. to Dismiss for Failure to Comply with Fed.R.Civ.P. 9(b) at 6]. Although the complaint does allege that such equipment was provided to Dr. Oscar Roadas in Jacksonville, Florida, American HomePatient maintains that such is insufficient for purposes of Rule 9(b). [*Id.* (citing *Rallis v. Holiday Inns, Inc.*, 622 F.Supp. 63, 65 (N.D. Ill. 1985))].

At the outset, Relator urges this court to modify existing law and hold the heightened pleading requirements of Rule 9(b) to be inapplicable to False Claims Act cases. However, in light of binding precedent from the United States Court of Appeals for the Eleventh Circuit holding that Rule 9(b) governs False Claims Act pleadings, the court declines to do so. *See Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 566-67 (11th Cir. 1994). Notably, Relator cites no authority, binding or otherwise, to support his argument. *But see United States ex rel. Russell v. Epic Healthcare Management Group*, 193 F.3d 304, 308 (5th Cir. 1999) (noting that "[a] special relaxing of Rule 9(b) is a qui tam plaintiff's ticket to the discovery process that the statute itself does not contemplate); *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, No. 1:97-CV-2200-TWT, 2000 U.S. Dist. LEXIS 17162, at *6 (N.D. Ga. Nov. 29, 2000) (rejecting Plaintiff's argument that Rule

9(b) should not apply to False Claims Act claims). Therefore, the court will apply the heightened pleading standards of Rule 9(b) to Relator's second amended complaint.

Relator maintains that even under the dictates of Rule 9(b), the second amended complaint passes muster. He contends that the complaint adequately sets out:

> the "who" – each scheme defines what Defendant(s) implemented it, and provides so much as possible the names of employees involved; the "what" – various specific types of misconduct, all of which culminated in false Certificates of Medical Necessity and resulting false claims for payment; the "where" – in most cases, nationwide, but with specific locations identified as to every Defendant with respect to every scheme; the "when" – in general, the entire period covered by the Act, but with specific periods (sometimes down to the date) identified by example; and the "how" – the essence of the schemes themselves.

[Relator's Mem. in Opp'n to the Mots. to Dismiss of Defendants Lincare, American HomePatient, and Alan Varraux at 11]. Essentially, Relator appears to argue that by providing sufficient detail regarding the methods by which Defendants allegedly submitted false claims for payment, he has met the requirements of Rule 9(b) for properly pleading a violation of the False Claims Act.

While the Federal Rules of Civil Procedure generally require in a complaint only a short and plain statement of the cause of action, Rule 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of a mind of a person may be averred generally." Fed.R.Civ.P. 9(b). In

addition to providing adequate notice to enable defendants to frame a response, this heightened standard serves to protect defendants from frivolous suits, to preclude fraud actions based upon facts obtained through discovery after the complaint is filed, and to prevent the damage to the goodwill and reputation of defendants that may result from even meritless claims. *United States ex rel. Stinson v. Blue Cross Blue Shield of Ga., Inc.*, 755 F.Supp. 1040, 1053 (S.D. Ga. 1990). Rule 9(b) may be satisfied if the complaint sets forth:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
>
> (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants "obtained as a consequence of the fraud.

Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1371 (11th Cir. 1997) (citations omitted). *See also Leonard v. Stuart-James Co.*, 742 F.Supp. 653, 659 (N.D. Ga. 1990) (motion to dismiss granted where complaint failed to allege "specifically when, where, by whom, or specifically what the representation was.").

Under certain circumstances, Rule 9(b) may be satisfied by alternative means. For example, where a complaint alleged generally that defendants engaged in racketeering activity by corresponding by mail, the submission of an affidavit demonstrating the existence of such correspondence was found to be sufficient. *Durham v. Business*

Management Assocs., 847 F.2d 1505, 1512 (11th Cir. 1988); *see also Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786 (3d Cir. 1984) (complaint, containing general allegations of misrepresentations and accompanied by a list identifying with specificity the subject of the alleged fraud, was found to be sufficient). Alternatively, where the information needed to plead fraud is peculiarly in the possession of the defendant, a complaint may pass Rule 9(b) muster if it so alleges and contains "a statement of facts upon which the allegations are based." *United States ex rel. Stinson*, 755 F.Supp. at 1052.

The application of this standard recently resulted in the dismissal of a complaint containing allegations similar to those at bar. In *United States ex rel. Butler v. Magellan Health Servs., Inc.*, 101 F.Supp.2d 1365 (M.D. Fla. 2000), a former employee of one of the defendants alleged that defendants (1) submitted fraudulent claims to federal government agencies to obtain benefits and accreditation unlawfully; (2) presented false certification to those agencies to enhance benefits and meet state accreditations; and (3) encouraged unnecessary patient admissions by waiving Medicare deductibles and certain co-payments, and then submitting false claims derived from those admissions. *Id.* at 1367. After dismissing the first amended complaint without prejudice for failure to comply with Rule 9(b), the court analyzed the second amended complaint under the standard set forth by the Eleventh Circuit in *Brooks*. 116 F.3d at 1371. Although the plaintiff had included additional specific facts that expanded upon the general allegations in the first amended complaint, the court noted that:

> Plaintiff pleads generally and never references or produces any such documents which would support false claims to the government. Similarly, there are no time or place allegations relating to false claims. Additionally, Plaintiff has plead no facts relating to content of any false claims or the manner in which they were submitted. Finally, Plaintiff fails to plead what the defendants received specifically as a result of the alleged fraud. The most significant omission in the course of Plaintiff's false claim allegation is the absence of any documents or forms which Plaintiff claims contains some fraud.

United States ex rel. Butler, 101 F.Supp.2d at 1369. Because simply pleading the existence of a fraudulent scheme prohibited by law is insufficient for purposes of the False Claims Act, the court granted the motion to dismiss without leave to amend. *Id.* at 1370.

Applying this standard for pleading fraud with particularity, this court finds that Relator's second amended complaint falls short of compliance with the requirements of Rule 9(b). In his second amended complaint, Relator makes sweeping allegations with little factual specificity. Although some paragraphs of the complaint contain glimpses of the detail demanded by Rule 9(b), such is not sufficient to save an otherwise fact-starved complaint. The court will not analyze each paragraph of the fifty-six page complaint, but will instead cite representative examples of the complaints shortcomings.

Relator alleges that Lincare provided free equipment to "referring physicians all across the State of Florida and in all places where Lincare does business . . . during the entire statutory time period." [Compl. at 11, 31]. Although Relator cites three doctors in West Palm Beach, Florida

who allegedly received such equipment, this single example does not adequately support an allegation otherwise unlimited in time and geography.

Relators allegations with respect to Varraux are similarly deficient. Relator claims Varraux has had a "kickback relationship" with Lincare "since before 1990" involving the "unbundling" of medicines in exchange for "several thousand dollars per month" and "other kickbacks." [*Id.* at 15, ¶ 41]. Such vague assertions regarding the time period and the nature of the alleged fraud cannot survive the scrutiny of Rule 9(b).

The requisite factual detail is also lacking in the allegations regarding American HomePatient. Relator alleges that American HomePatient "entered into medical director agreements with referring physicians across the United States" consisting of monthly payments based on the number of patient referrals. [Compl. at 16, ¶ 45]. Relator again seeks to support this claim with a reference to two doctors in Jacksonville, Florida who allegedly received "approximately $750 per month for many years" pursuant to this referral scheme. [*Id.* at 17, ¶ 48]. Given the breadth of the allegation, this solitary detail is not adequate.

Most importantly, Relator never sufficiently alleges the submission of a false claim for payment to the government, the sine qua non of a False Claims Act violation. Although Relator asserts that Defendants' actions "resulted in the submission of thousands of false claims for payment to the United States," he fails to supply any further details as to when, where, and by whom any such claim was submitted to the government. [*See* Compl. at 19, ¶ 54]; *see also United States ex rel. Cox v. Iowa Health*

System, 29 F.Supp.2d 1022, 1025 (S.D. Iowa 1998) (dismissing False Claims Act count for failure to specify when and by whom each false claim was submitted for payment). Despite the weight of authority to the contrary, Relator seeks to frame his False Claims Act suit by generally alleging fraudulent practices which, in theory, could lead to the submission of false claims. This manner of pleading is not contemplated by the False Claims Act. *See United States ex rel. Clausen*, 2000 U.S. Dist LEXIS 17162, at *7 – 8; *accord U.S. ex rel. Schwartz v. Coastal Healthcare Group, Inc.*, No. 99-3105, 2000 WL 1595976 (10th Cir. 2000) (unpublished table decision) (plaintiff "describes only the generalities of how [the allegedly fraudulent scheme] operated, and nowhere does he identify a physician or a specific occasion when the practice resulted in a kickback or other illegal activity."); *U.S. ex rel. Walsh v. Eastman Kodak Co.*, 98 F.Supp.2d 141, 147-48 (D. Mass. 2000) ("Relater's First Amended Complaint, in essence, sets out a methodology by which the vendors might have produced false invoices, which in turn could have led to false claims. Without citing a single false claim arising from an allegedly false invoice, Relator has not met even a bare-bones Rule 9(b) test."); *Ex rel. G. Michael Gublo, et al v. Novacare, Inc.*, 62 F.Supp.2d 347, 354 (D. Mass. 1999) (dismissing complaint under Rule 9(b) where relator alleged three methods by which the defendant inflated its bills to the government, but failed to cite a single instance of a false claim); *United States ex rel. Sanders v. East Alabama Healthcare Authority*, 953 F.Supp. 1404, 1413 (M.D. Ala. 1996) ("While the Plaintiffs' First Amended Complaint alleges that [defendants] acted inappropriately during the CON procurement process, the court finds that the complaint does not tie these acts to the

submission of false claims or another activity prohibited by 31 U.S.C. § 3729(a).").

This court finds that the instant action is on all fours with *United States ex rel. Butler*, 101 F.Supp.2d at 1369. Just as the second amended complaint in *Butler* included "additional specific facts that expand upon the general allegations in the Amended Complaint," so too has Relator attempted to perfect his second amended complaint. *See id.* However, this court is likewise compelled to conclude that although "these allegations are illustrative of the type of fraud [Relator] alleges, none of these facts address any false claim or any document bearing a false claim on the part of Defendants." *See id.*

Relator's reliance on *United States ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (S.D. Tex. 1998) is unavailing. There, the plaintiff alleged that the defendants falsified monthly reports regarding oil sales and royalty remittances for land owned by the United States and leased by defendants, thereby underpaying their royalty obligations. *Id.* at 207. The plaintiff "set out in some detail seven schemes or methods defendants used to knowingly enter the false claims and underpay their royalty obligations." *Id.* Defendants argued that Rule 9(b) required the plaintiff to provide the specific dates and invoice numbers for each transaction and "the name of each employee who entered the alleged false information upon the [monthly report] for each lease, for each month for the last decade." *Id.* In denying the defendants, motion to dismiss, the court explained that the "particularities of this case do not compel such specifics since the what, when, and where are so obviously exactly plead." *Id.* Because the information sought by the defendants was solely a matter of internal

corporate affairs, the court held that Rule 9(b) did not command such a degree of detail. *Id.*

By contrast, the sparse details contained in the instant complaint do not adequately specify the what, when, and where of any allegedly fraudulent schemes. Moreover, Relator does not allege that the information lacking here is exclusively held by Defendants so as to trigger a relaxed Rule 9(b) standard. Unlike the complaint in *Johnson*, the instant complaint fails to sufficiently identify the conduct complained of such that Defendants could mount a defense. Permitting such a complaint to suffice would contravene one of the primary purposes of Rule 9(b): to notify defendants of the allegations against which they must defend. *Accord United States ex rel. Clausen*, 2000 U.S. Dist. LEXIS 17162, at *8.

Relator also relies on a selective quote from *Georgia Gulf Corp. v. Ward*, 701 F.Supp. 1556, 1560 (N.D. Ga. 1987), for his argument that Rule 9(b) does not require the inclusion of the dates and times of fraudulent conduct. [*See* Relator's Hem. in Opp'n to the Mots. To Dismiss of Defendants Lincare, American HomePatient, and Alan Varraux at 8]. However, the complete quote appears to support Defendants, position. In denying a motion to dismiss a RICO complaint for failure to comply with Rule 9(b), Judge O'Kelley explained:

> While Georgia Gulf has not alleged the exact dates when kickbacks were received, the complaint clearly shows who received them (Ward and Watkins), who paid them (Roskind and Holtrachem), and how they were paid (indirectly through Carolina Nitrogen, or directly by Roskind and Holtrachem), and how the mails and wires were used in furtherance of the

> scheme. Failure to state the dates and times of receipt of kickbacks is not fatal to the complaint, as the defendants have been apprised of the nature of the action against them, and are therefore on notice of sufficient allegations upon which to mount a defense.

Id. at 1560. Relator's complaint does not appear to contain the level of specificity described above. The isolated instances in which Relator specifies the date, location, persons involved, or method of fraudulent conduct do not sufficiently advise Defendants of the breadth of the charges against them.

To date, Relator has had three opportunities to perfect his complaint. Additionally, this court has previously advised Relator to comply with the requirements of Rule 9(b). *See United States ex rel. Corsello v. Lincare, Inc.*, No. 1:98-CV-0204-ODE, slip op. at 2 (N.D. Ga. June 18, 1999). Although "a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice," the court need not provide Relator with unlimited opportunities to correct his complaint. *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). Therefore, because Relator has failed to plead fraud with particularity as mandated by Federal Rule of Civil Procedure 9(b) and as previously directed by this court, the second amended complaint is dismissed with prejudice.

The court will now address Defendants' remaining motions. With respect to Lincare's motion to file a supplemental brief in light of new authority and motion for leave to file supplemental brief in light of *Clausen* decision, the court concludes that this authority is relevant to the resolution of the motion to dismiss, as discussed above. Thus, the court will exercise its discretion to grant said

motions nunc pro tunc. Lincare's remaining motion to dismiss qui tam claims on constitutional grounds and motion to dismiss pursuant to 31 U.S.C. § 3730(b)(5) and Federal Rule of Civil Procedure 12(b)(1) are dismissed as moot in light of the court's granting of Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 9(b).

Accordingly, American Inc.'s motion to dismiss Relator's second amended complaint for failure to comply with Federal Rule of Civil Procedure 9(b) and for failure to state a claim [#115] is hereby GRANTED. Lincare Inc. and Lincare Holdings Inc.'s renewed motion to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) (#116] is hereby GRANTED. Additionally, Lincare's motion to file a supplemental brief in light of new authority [#144] and Lincare's motion for leave to file supplemental brief in light of *Clausen* decision [#157] are hereby GRANTED NUNC PRO TUNC. Lincare's motion to dismiss qui tam claims on constitutional grounds [#117] and Lincare's motion to dismiss pursuant to 31 U.S.C. § 3730(b)(5) and Federal Rule of Civil Procedure 12(b)(1) [#152] are hereby DISMISSED AS MOOT.

SO ORDERED, this 9 day of MARCH, 2001.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11868-AA

KIRK S. CORSELLO,

Plaintiff-Appellant,

versus

LINCARE, INC.,
LINCARE HOLDINGS, INC.,
ROTECH, INC.,
ALAN VARRAUX, M.D.,
ROTECH MEDICAL CORPORATION,

Defendants-Appellees,

LINCARE HEALTHCARE
GROUP, INC., AMERICAN
HOME PATIENT, INC., et al.,

Defendants.

On Appeal from the United States District Court for the Northern District of Georgia

(Filed Jan 06, 2006)

BEFORE: TJOFLAT, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor, Jr.
UNITED STATES
CIRCUIT JUDGE

31 U.S.C. § 3729

§ 3729. False claims

(a) Liability for certain acts [Caution: For inflation-adjusted civil monetary penalties, see 28 CFR 85.3.]. Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729 [31 USCS § 3729]. If the Attorney General finds that a person has violated or is violating section 3729 [31 USCS § 3729], the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 [31 USCS § 3729] for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section

until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person

initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person

proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or

conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and

damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 [31 USCS § 3729] upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729 [31 USCS § 3729], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.